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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BERNITA WASHINGTON; KEVIN WASHINGTON;
PEGGY MALBROUGH; ROY MALBROUGH, JR.;
BERNICE AUGUSTINE GUICHARD;
VERNON GUICHARD, JR.,
Petitioners,

versus

CSC CREDIT SERVICES, INC.;
EQUIFAX CREDIT INFORMATION SERVICES, INC.,
EQUIFAX, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I Whether a class of persons, whose credit reports were sold and delivered electronically to insurance companies, without the credit reporting agency obtaining their consent, must show an impermissible disclosure of their credit report under §1681b of the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*, "FCRA"), in order to have standing to seek equitable relief requiring adequate procedures, under the separate provisions of §1681e(a) of the FCRA, and under the Declaratory Judgment Act, 28 U.S.C. 2201.

II Whether individuals may bring an action for injunctive relief under §1681e(a) of the Fair Credit Reporting Act [15 U.S.C. 1681, *et seq.*, "FCRA"] seeking statutorily mandated "reasonable procedures" to insure the confidentiality and proper use of their credit reports in electronic commerce.

III Whether a class seeking declaratory relief may be certified under Fed. R. Civ. P. 23(b)(2), even if a private action for injunctive relief is unavailable.

IV Whether equitable relief predominates over monetary relief under Fed. R. Civ. P. 23(b)(2), where the class members seek declaratory and injunctive relief to insure the confidentiality and proper use of their credit reports, and the district court's factual finding

is that the equitable relief predominates over the statutory damages provided for by the Fair Credit Reporting Act [15 U.S.C. 1681, *et seq.*], and further found that *if* there are any actual damages to be awarded, these claims could be severed, and decided separately from the liability issues, without any violation of the Seventh Amendment.

PARTIES TO THE PROCEEDING

Petitioners:

The six Petitioners [Bernita Washington; Kevin Washington; Peggy Malbrough; Roy Malbrough, Jr.; Bernice Guichard; and Vernon Guichard, Jr.] are persons whose credit reports were sold and delivered electronically by the Respondent credit reporting agencies to an insurance company, which used them for the purpose of investigating claims: 1) without the credit reporting agencies having obtained Petitioners' written consent, and 2) without the individual certifications of purpose recommended by the Federal Trade Commission to comply with the requirements of §1681e(a) of the Fair Credit Reporting Act, that "reasonable procedures" be maintained to insure the permissible use of the credit reports.

The class certified by the district court comprises persons whose credit reports were sold and electronically delivered to insurance companies, without the "reasonable procedures" mandated by §1681e(a) of the Fair Credit Reporting Act, as interpreted by the Federal Trade Commission, to insure confidentiality and proper use of the credit reports.

Respondents:

Both Respondents [CSC Credit Services, Inc. and Equifax Credit Information Services, Inc.] are credit reporting agencies as defined by the Fair Credit Reporting Act, which sold and electronically delivered the credit reports of the Petitioners to insurance companies without first obtaining their consent.

CORPORATE DISCLOSURE STATEMENT

The Petitioners have no corporate affiliation.

Respondent, CSC Credit Services, Inc. has not provided to Petitioners any information with regard to its corporate affiliations.

Respondent, Equifax Credit Information Services, Inc. has not provided to Petitioners any information with regard to its corporate affiliations, but is a wholly owned subsidiary of Equifax, Inc., which is a publicly-traded corporation.

Respondent, Equifax, Inc., has not provided to Petitioners any information with regard to its corporate affiliations, but is a publicly-traded corporation.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 199 F. 3d 263 (5th Cir. 2000). A copy of that opinion is included in Appendix "A". The opinion of the United States District Court certifying this action to proceed as a class action is reported at 178 F.R.D. 95 (E.D.La. 1998). A copy of that opinion is included in Appendix "B". The opinion of the United States District Court of the defendant-respondent's motion to reconsider class certification is reported at 180 F.R.D. 309 (E.D.La. 1998). A copy of that opinion is included in Appendix "C"

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on January 7, 2000. This Petition for Writ of Certiorari is filed within 90 days of the date of that opinion. The court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

Constitutional Provisions:

None involved.

Treaties:

None involved.

Statutes:

The following sections of the Fair Credit Reporting Act:

15 U.S.C. 1681b [Text set forth in Appendix D]

15 U.S.C. 1681e [Text set forth in Appendix E]
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15 U.S.C. 1681n [Text set forth in Appendix G]
15 U.S.C. 1681o [Text set forth in Appendix H]
15 U.S.C. 1681u [Text set forth in Appendix I]

The Declaratory Judgment Act:
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Federal Rule of Civil Procedure 23
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STATEMENT OF THE CASE

This Petition for Certiorari presents an inordinate number of questions for review, due to the novel and circuitous route taken by the Fifth Circuit Court of Appeals, to reverse and vacate the well-reasoned decisions of the District Court.

The Petitioners, and all members of the class certified by the District Court, bring complaints under §1681e(a) of the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*, and also under §1681b of the FCRA. Petitioners' consumer reports (often referred to as "credit reports") were sold and electronically delivered to their insurance companies, by the Respondent credit reporting agencies, without the individual certifications of purpose and "reasonable procedures" required by §1681e of the FCRA, as recommended by the Federal Trade Commission ("FTC")[1], and without the credit reporting agencies obtaining their consent. The insurance companies used the Petitioners' credit reports in connection with investigating claims, litigating against the Petitioners, and negotiating settlements.

The Insurance company subscribers receive from the defendant consumer reporting agencies a software package and a subscriber number. The insurers can then access all of the credit reports on the reporting agencies' database. At the time that claimants file insurance claims for losses under their policies, the insurance companies often obtain general

---

[1] The FTC administers the FCRA, 15 U.S.C. 1681s. The District Court's decision certifying the class cites the advice of the FTC's Commentary on the FCRA. 178 F.R.D. 95, 98-99 (E.D. La. 1998).

financial authorizations which contain, *inter alia*, consents to obtain credit reports. However, the Respondent credit reporting agencies did not ever obtain claimants' consents from the insurance companies. Instead, the credit reporting agencies rely on the insurance companies, which stand in an adversarial position to the claimants, to obtain the consents required by §1681b from the claimants.

Petitioners allege that it is not a reasonable procedure, under §1681e(a) of the FCRA, for credit reporting agencies to rely on claimants' adversaries to protect the privacy of their credit reports under §1681e(a) of the FCRA. Petitioners contend, instead, that reasonable procedures under §1681e(a) of the FCRA would require that the consumer reporting agencies obtain consent from consumers, before releasing their credit reports to insurance companies, where there is no other permissible purpose under §1681b of the FCRA.

In addition, Petitioners contend that §1681e(a) requires, as a "reasonable procedure," that credit reporting agencies follow the advice of the Federal Trade Commission's Advice and Commentary to the Fair Credit Reporting Act, 16 C.F.R. Part 600, that where a user, such as an insurance company, has both a permissible (underwriting) and an impermissible (claims investigating) purpose for using credit reports, the credit reporting agency must obtain an individual certification of the purpose for which the credit report is obtained, together with certification that the credit report will be used for no other purpose. The Respondent credit reporting agencies fail to do so.

In the District Court, the Respondent credit reporting agencies argued that before claimants have standing to challenge their procedures under §1681e(a), they must show that there has been an improper disclosure of their credit

reports under §1681b. In other words, the Respondents argue that standing to bring an action under §1681e(a) requires *more* than the threat of imminent harm, as this Honorable Court's decisions hold; Respondents argue that standing under §1681e(a) requires a showing of *actual* harm, suffered under §1681b. Respondents argue that this precludes class certification of the §1681e(a) claim, under Fed. R. Civ. P. 23, due to the necessity for individualized inquiries into the circumstances of each consent obtained from each claimant (i.e., whether there has been a fraud or misrepresentation in obtaining the consent from the claimant, so as to render it invalid under §1681b).

The District Court correctly recognized that this action focuses not on whether the insurance companies did, or did not, obtain valid consents from consumers, but instead, on whether the Respondent credit reporting agencies maintain "reasonable procedures" in furnishing credit reports to insurance companies. The District Court correctly noted that whether or not insurance companies obtained consents, it is undisputed that the credit reporting agencies did not obtain them. Nor did the credit reporting agencies obtain the certifications of purpose recommended by the FTC's Commentary to the FCRA.

The District Court certified this action to proceed as a class action under Fed. R. Civ. P. 23(b)(2), and in a subsequent decision, alternatively, under Fed. R. Civ. P. 23(b)(3). The District Court made the factual findings (1) that the Respondents' procedures at issue are standardized; (2) that the equitable relief sought by the Petitioners predominates over monetary relief, because statutory and punitive damages are awarded based on a finding of liability, without individualized inquiries; (3) that the statutory damages provided for by the FCRA are minimal; and (4) that any

claims for actual damages, if they need be determined after liability is decided, can be severed for separate decision, without violating the Seventh Amendment by reconsidering any issue that was previously considered in deciding liability.

The Fifth Circuit reversed the class certification under Rule 23(b)(2), finding that (1) injunctive relief is unavailable under the FCRA; (2) declaratory relief may not be sought in a class action, where injunctive relief is unavailable; and (3) the equitable relief sought does not predominate over monetary relief. The Fifth Circuit vacated the Rule 23(b)(3) class certification, finding that the District Court erred in holding that claimants have standing to bring claims under §1681e(a), without a prior showing that there has been an improper disclosure (actual harm) under §1681b.

Petitioners respectfully submit that this class action implicates the important issue, whether existing federal consumer protection statutes can accommodate the rapid growth of information-gathering technology, to serve the needs of both business and consumers.

REASONS FOR GRANTING THE WRIT

Argument 1:

The decision of the Court of Appeals for the Fifth Circuit, that all class members must first show the actual harm of an improper disclosure of their credit reports under §1681b of the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*, "FCRA"), before they have standing to seek relief against the threat of imminent harm, under the separate provisions of §1681e(a) of the

FCRA, decides an important issue of federal law, that has not previously been decided, contrary to this Honorable Court's precedents with respect to standing.

The rapid growth of electronic commerce requires that consumers have confidence in the confidentiality and proper use of their private financial information. The Fair Credit Reporting Act [15 U.S.C. 1681, *et seq.* "FCRA"], §1681e(a), provides that credit reporting agencies must maintain "reasonable procedures" to insure the confidentiality and permissible use of credit reports. However, the procedures maintained by the Respondent credit reporting agencies allow insurance company employees, and any other subscriber, to access all of the millions of credit reports on the computer database of the credit reporting agencies, without any oversight by the credit reporting agency. At oral argument, the District Court correctly observed that any claims investigator in any insurance office can access the credit report of any citizen, including those of the District Judge herself, and the twelve Supreme Court Justices, without providing any certification of purpose or consumer's consent to the credit reporting agency.

Congress provided in §1681b of the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*, "FCRA") that credit reports may be provided under certain circumstances "and no other." In addition, Congress independently provided, in §1681e(a) of the same Act, that credit reporting agencies must maintain "reasonable procedures" to insure the confidentiality and permissible use of credit reports. By enacting the two separate provisions, Congress clearly meant to impose the duty to adopt reasonable procedures to *prevent* improper disclosure and misuse *before* they occur (under §1681e(a)), as well as to restrict the purposes for which credit reports could

be provided and used (under §1681b). §§1681n and 1681o were enacted, in addition, to provide a remedy for violations of "any provision" of the FCRA.

The District Court correctly recognized that the duty imposed by §1681e(a), to maintain reasonable procedures to insure the proper use of credit reports, even after they are permissibly obtained, is independent of the duty imposed by §1681b, to furnish credit reports only under certain circumstances and no other. Otherwise, a user of credit reports could obtain them for a permissible purpose, but then use them for another, impermissible purpose. That is what happened to certain of the Petitioners here, whose credit reports were obtained for the permissible purpose of underwriting, but later used for the impermissible purpose of claims investigating. The Federal Trade Commission ("FTC") recommends that "reasonable procedures" require an individual certification of use, where a user has both a permissible (such as underwriting) and an impermissible (such as claims investigating) use for credit reports. *Federal Trade Commission Advice and Commentary on the Fair Credit Reporting Act* [16 C.F.R. Part 600].

Insurance companies sometimes obtain general financial authorizations from claimants at the time they make claims, which contain a consent, *inter alia*, to the insurance companies' obtaining the claimants' credit report. At the time claimants file claims, they are usually unrepresented, and unaware that the FCRA prohibits the use of credit reports in connection with claims investigating. In addition, the Respondent credit reporting agencies do not ever obtain any claimants' written consent from the insurers. Instead, the credit reporting agencies delegate their duty to obtain the consumer's written consent to the insurance company, which stands in an adversarial position to the claimant. Petitioners

allege that these procedures are plainly unreasonable under §1681e(a), as, in effect, 'the wolves are left to guard the sheep.'

The Fifth Circuit Court of Appeals found that in order to have standing to assert a claim under §1681e(a), claimants must show more than the imminent threat of harm resulting from defendants' failure to comply with the "reasonable procedures" requirement. Instead, the Fifth Circuit held that in order to have standing under §1681e(a), claimants must show an impermissible disclosure (actual harm) of their credit reports under §1681b. This would require an individualized inquiry into the circumstances of whether an insurer obtained a consent from a consumer, and whether there was any fraud or misrepresentation involved in obtaining the consent. Respondents argue that such individualized inquiries would foreclose class certification of claims under §1681e(a), with respect to the Respondent credit reporting agencies' standardized practices, seeking equitable relief.

The Fifth Circuit's holding requires that claimants show the actual harm of an improper disclosure before they have standing to seek reasonable procedures under §1681e(a). This is contrary to the clear intent of Congress, in enacting the two separate and independent subsections of the FCRA, §1681e(a) and §1681b, which impose different duties, to accomplish different purposes. Moreover, the Fifth Circuit's holding is contrary to this Court's precedents, which hold that the threat of "actual or *imminent harm*," suffices to confer Article III standing. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. ____; 120 S.Ct. 693; 145 L.Ed.2d 610 (2000), and citations therein. The Fifth Circuit's holding forecloses Petitioners' class claims for equitable relief, and arguably, forecloses the claims of *any* consumer class which seeks equitable relief to remedy

inadequate procedures, where each consumer has not already suffered damage. The Fifth Circuit's decision goes a long way towards emasculating the existing federal consumer protection statutes, in the context of standardized, electronic commercial transactions.

The FCRA, enacted, in 1970, was a Congressional response to the collection of huge databases of private consumer financial information, which had been compiled by credit reporting agencies, even before they could instantly and electronically transmit their millions of credit reports to any personal computer. The legislative history is prescient:

> "The bill I am introducing today attempts to strike a balance between the legitimate need for information by those supplying credit, insurance and employment and the individual's right to assurance that information about himself be collected and disseminated in the most careful manner.
>
> "It is only a matter of time before information on every American will be in a computer data bank. Currently, the Associated Credit Bureaus of America, having over 2,200 members serving 40,000 [sic] creditors in 36,000 communities, maintain files on more than 110 million Americans. Another firm, Retail Credit Co., has files on 45 million individuals. An industry spokesman recently estimated that it would be a mere 5 years before everyone who has applied for credit would be included in their computerized file." *91st Cong., 2nd Sess., 116 Cong. Rec. 6200 (1970).*

It is highly important today, in view of the explosive growth of electronic commerce, that existing consumer protection laws respond, as they were intended, to the developments in information-gathering technology. Consumers must be able to exercise the rights Congress provided, to enforce by means of class-wide equitable relief the existing consumer protection laws, with respect to generally-applicable, standardized commercial practices. In this way, the needs of commerce, and those of consumers can be served. The growth of electronic commerce depends on the right to guard financial privacy and insure proper use of consumers' financial information. This cannot happen, if each consumer must first show actual harm-- an improper disclosure--before he or she has standing to challenge class-wide, standardized procedures. To require an individualized prior showing of actual harm, in order to remedy class-wide procedures, will render the existing consumer protection laws useless in the context of mass, electronic commerce. It will irreparably undermine consumer confidence in "e-commerce" if existing consumer protection laws cannot be used to enforce procedures that protect the confidentiality and proper use of consumers' private financial information, before each member of a consumer class suffers actual harm.

The Fifth Circuit's holding that individuals must show an improper disclosure under §1681b, before they have standing to maintain an equitable action (seeking to *prevent* improper disclosures under §1681e(a)), sidesteps this Court's recent holding in *Ortiz v. Fibreboard Corp., et al,* 527 U.S. 815, ___; 119 S.Ct. 2295, 2307; 144 L.Ed.2d 715, 732 (1999). The Fifth Circuit's decision incorrectly conditions standing to challenge class-wide standardized procedures, under §1681e(a), not on 'the imminent threat of harm," as correctly found by the District Court, but instead, on the individualized inquiry, whether there has already been an

improper disclosure of each claimant's credit report under §1681b. The Fifth Circuit's holding thwarts the purposes of §1681e(a), and Fed. R. Civ. P. 23, as well as the Declaratory Judgment Act.

The Fifth Circuit's decision leaps past this Court's holding in *Ortiz v. Fibreboard Corp., et al,* 527 U.S. 815, ___; 119 S.Ct. 2295, 2307; 144 L.Ed.2d 715, 732 (1999), citing *Amchem v. Windsor,* 521 U.S. at 612-13, that the Rule 23 inquiry is "logically antecedent" to the Article III standing inquiry, by conditioning standing to bring an action under §1681e(a) on a showing of actual harm already suffered under §1681b. However, there is nothing in the text, or the legislative history, of the Fair Credit Reporting Act to indicate that Congress intended to condition an action for violation of the provisions of §1681e(a), on a showing of prior actual harm under §1681b. To the contrary, the two separate provisions, enacted in separate subsections of the FCRA, mean that Congress intended to impose two separate and independent duties on credit reporting agencies, to furnish credit reports under certain circumstances and no other, and separately, to maintain reasonable procedures to insure the confidentiality and permissible use of credit reports, even where they are, presumably, permissibly furnished.

Argument 2:

The Decision of the Court of Appeals, holding that injunctive relief is unavailable to individuals under the Fair Credit Reporting Act [15 U.S.C. 1681, *et seq.*], incorrectly decided an important issue of federal law contrary to Supreme Court precedent, causing a split between the Fifth and Ninth Circuits.

The District Court correctly recognized this Court's long-established principle, that "absent the ***clearest command*** to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." [emphasis added]. *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 2559, 61 L.Ed.2d 176 (1979), citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) and *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942).

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1982).

> "[C]ases in which injunctions are sought in federal court reflect 'a practice with a background of several hundred years of history', a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the court's discretion, but we do not lightly assume that Congress has intended to depart from established principles." [Internal citations omitted.] *Weinberger*, *supra*, at 313, 102 S.Ct., at 1803.

The legislative history of the FCRA clearly states that the Act was intended to enable consumers to enforce the Act, coextensively with the Federal Trade Commission ("FTC").

> "The purposes of the Fair Credit Reporting Act are to give **consumers** a chance to correct inaccurate information in their credit file; to preserve the confidentiality of such information; and to **prevent** undue invasions of the individual's right to privacy." [Emphasis added.] 91st Cong., 2nd Sess. 116 Cong. Rec.-Senate 35937, 35941.

It follows from this joint grant of enforcement powers, to consumers and to the Federal Trade Commission, that Congress did **not** intend to limit the ability of consumers to obtain injunctive relief under the FCRA. Rather, the Act was meant to respond to the growth of information technology, which was then in its infancy, by private enforcement as the need arose, including use of the courts' traditional equitable powers.

> "The purposes of the Fair Credit Reporting Act are to give **consumers** a chance to correct inaccurate information in their credit file; to preserve the confidentiality of such information; and to **prevent** undue invasions of the individual's right to privacy." [Emphasis added.] *91st Cong., 2nd Sess. 116 Cong. Rec.-Senate 35937, 35941.*

The FCRA specifically bars only two common law actions, for defamation and invasion of privacy, against a credit reporting agency. 15 U.S.C. 1681h(e). The District Court correctly notes the *quid pro quo* provided by the FCRA's provisions. 178 F.R.D. at 102. However Congress recognized that **a consumer "may, of course, bring any action allowed by common law or statute."** [Emphasis added.] *91st Cong, 2nd Sess., 116 Cong Rec 36569, 36573 (1970).*

The legislative history, and the contemporary legal context in which the FCRA was enacted, clearly indicates that Congress intended that traditional equitable remedies, including injunctive relief, be available to consumers, to enforce the provisions of the FCRA co-extensively with the Federal Trade Commission. Congress intended to provide a flexible means of responding to the rapid development of information technology. Congress did not specifically provide for injunctive relief to consumers in the FCRA, because under contemporary Supreme Court decisions, which are still followed today, equitable relief was always available, unless specifically denied. *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) and *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942). See also, *Califano v. Yamasaki, supra.*

The Fifth Circuit Court of Appeals supports its denial of injunctive relief by analogy to cases which in turn rely on the Fair Debt Collection Practices Act ["FDCPA"], 15 U.S.C. 1692 *et seq.*, a statute which was enacted seven years after the FCRA. Petitioners respectfully submit that this reliance on the FDCPA is misplaced, because that statute, too, does not evidence any intent to deny equitable relief to consumers. This Honorable Court instructs that the evaluation of congressional action in must take into account "its contemporary legal context." *Cannon v. University of Chicago,* 441 U.S. 677, 699, 99 S.Ct.1946, 60 L.Ed.2d 560 (1979). The "contemporary legal context" in which both the FCRA and the FDCPA were enacted, in 1970 and 1977, respectively, squarely held that equitable relief was always available, unless specifically denied.

If any analogy to another statute is necessary to interpret the FCRA[2], then reference should be made to the contemporaneously enacted provisions of the 1968 Consumer Credit Protection Act (15 U.S.C. 1601, *et seq.*). The Truth-in-Lending Act, for instance, has always been held to afford equitable relief to private litigants, despite the extensive regulatory authority granted to the Federal Trade Commission under the TILA. *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 116 (5th Cir. 1975).

The Fifth Circuit bases its decision on this tenuous reasoning: the affirmative grant of power to the FTC to

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[2] Petitioners submit that Congressional intent that the FCRA afford equitable relief to consumers is plain by reference to the statute itself, the contemporary legal context in which it was enacted, and the previously cited legislative history; therefore no reliance on judicial interpretations of other statutes is necessary.

pursue injunctive relief,[3] coupled with the absence of a similar affirmative grant to private litigants, when they are expressly granted the right to obtain damages and other relief, and the affirmative grant of power to private litigants to seek injunctive relief against the FBI, in one lone subsection of the revised FCRA, enacted twenty-seven years after the original Act, "persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC." 199 F.3d 263, ___. But, Petitioners respectfully suggest that this reasoning is not persuasive at all, in light of the legislative history and the contemporary legal context in which the FCRA was enacted. In 1970, there was clearly no need for Congress explicitly to provide for equitable relief, because this Court's precedents unequivocally held, and still hold, that equitable relief is always available absent a *clear command* from Congress to the contrary.

It is the joint grant of enforcement powers, to consumers and the FTC, which provides the FCRA the means to respond to rapid changes in the growing information industry. The legislative history quoted above clearly shows that Congress recognized this developing information-gathering technology, even in 1970. The legislative history clearly states that Congress intended that the FCRA serve the needs of commerce, and consumers, as these expanded with the growth of information technology. Equally clearly, the legislative history and the plain text of the FCRA indicate that Congress meant to provide consumers, jointly with the FTC,

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[3] It should be noted that this is an indirect grant of power to the FTC through the 'cease and desist' powers granted to it by the Federal Trade Commission Act, 15 U.S.C. 45(b). The Fifth Circuit also rests its decision on the tenuous support of a single subsection, enacted twenty-seven years after the FCRA.

a means of enforcing their right to financial privacy in the 'information age.'

Petitioners respectfully submit that this Honorable Court should grant certiorari in this matter because of the broad importance of the issues here in the context of rapidly developing information-gathering technology. It is necessary that currently existing consumer protection laws accommodate the rapid growth of information technology, which was recognized by Congress even in 1970. These laws were enacted so that as information technology developed, equitable remedies could respond flexibly, to enforce adequate procedures to protect the confidentiality and proper use of private financial information. The legislative history clearly states the intent that consumers and the FTC jointly enforce the FCRA.

Argument 3:

The Decision of the Court of Appeals that a class action seeking declaratory relief may not be certified under Fed. R. Civ. P. 23(b)(2) if injunctive relief is unavailable to the class, incorrectly decided an important issue of federal law that has not been decided but should be settled by this Honorable Court.

The Declaratory Judgment Act provides that any court of the United States "in a case of actual controversy within its jurisdiction . . . may declare the rights and other legal relations of any interested party seeking such declaration, **whether or not further relief is or could be sought.**" [emphasis added] 28 U.S.C. 2201. Fed. R. Civ. P. 23(b)(2), provides that class actions may be brought under that

subsection, whenever the requirements of Rule 23(a) are met, and in addition, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief **or corresponding declaratory relief** with respect to the class as a whole." [emphasis added] Fed. R. Civ. P. 23(b)(2). This clear and unambiguous language does not support the Fifth Circuit's novel holding.

The Fifth Circuit's decision in this action denies class access to the relief traditionally available to resolve claims based on class-wide, standardized practices, "where the party opposing the class has acted or refused to act on grounds generally applicable to the class." The Fifth Circuit's decision leaves defendants unable to effect class-wide resolution of claims, where declaratory relief is appropriate, and leaves plaintiffs unable to seek class-wide redress under the Declaratory Judgment Act (28 U.S.C. 2201), even where the equitable relief predominates. But, this was not the intent expressed by Congress.

> "By the Declaratory Judgment Act [28 U.S.C. 2201, *et seq.*], Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity . . . to grant a new form of relief to qualifying litigants . . ." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289, 115 S.Ct. 2137, 2143, 132 L.Ed.2d 214 (1995).
>
> "Therefore, [Fed. R. Civ. P.] 57 and 28 U.S.C. 2201 must be read together, and liberally construed to effectuate the objectives of declaratory relief." *Moore's Federal Practice, 3rd Edition*, Vol. 12, p.57-12 (1999).

> "Declaratory and injunctive relief have many attributes in common. Nonetheless, they are distinct remedies that may or may not be sought together in the same action. Although the result may be similar in both types of actions because each involves a court determination regarding the propriety of a particular course of action, declaratory relief involves a lesser showing than injunctive relief, and does not contain the coercive element of an injunction. A judge may determine that plaintiffs are entitled to declaratory relief, while at the same time denying the issuance of injunctive relief on equitable grounds." *Id* at pp.57-26 & 57-27.

> "The District Court had 'the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'" *Super Tire Engineering Company v. McCorkle,* 416 U.S. 115, 121, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974).

The Fifth Circuit's decision, relying on no authority whatsoever, reaches the novel holding that a class seeking declaratory relief may not be certified under Rule 23(b)(2), where injunctive relief is not available. This holding, contrary to the express provisions of Rule 23(b)(2), forecloses the ability to obtain class-wide relief under the Declaratory Judgment Act, except where an injunction is also available. This is directly contrary to the holdings of this Honorable Court that the Declaratory Judgment Act expands the relief available to litigants and should be liberally applied. *Wilton v. Seven Falls, supra; Super Tire Engineering v. McCorkle,*

supra. *See also*, *Moore's Federal Practice, 3rd Edition*, Vol. 12, p.57-12 (1999). Moreover, the Fifth Circuit's decision contradicts the Congressional intent clearly expressed in Fed. R. Civ. Proc. 23(b)(2), which provides for class certification whenever injunctive ***or*** corresponding declaratory relief is sought.

The Ninth Circuit has held that even if one statute prohibits injunctive relief in a certain set of facts, the plain language of the Declaratory Judgment Act allows declaratory relief in the same case. *United Food and Commercial Workers Local v. Food Employers Council, Inc.* , 827 F.2d 519 (9th Cir. 1987).

In *United Food*, the Ninth Circuit correctly noted that imposing restrictions and limitations borrowed from existing, separate remedies upon the relief authorized by the Declaratory Judgment Act would not serve the Act's purpose. This is precisely what the Fifth Circuit does, by restricting the application of Fed. R. Civ. P. 23(b)(2), when that subsection was enacted specifically to provide for class actions seeking declaratory relief. The Ninth Circuit correctly holds that the Declaratory Judgment Act created a new remedy and expanded the judicial process by putting a new implement at the disposal of the courts. Citing C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure,* § 2751, at 569 (2d ed. 1983).

The Fifth Circuit's decision in this matter imposes a broad restriction on the availability of declaratory relief to class-action litigants, where the class may not qualify for injunctive relief. This restriction is unsupported by the language and intent of the Declaratory Judgment Act, and Fed. R. Civ. P. 23(b)(2). The Fifth Circuit's holding is also contrary to this Court's precedents, which hold that the

Declaratory Judgment Act sought to *expand* the remedies available, "to place a remedial arrow in the district court's quiver," and "grant a new form of relief" to litigants. *Wilton v. Seven Falls*, *supra*. Petitioners respectfully suggest that this Honorable Court grant certiorari to decide this important, unsettled question of federal law.

Argument 4:

The issue whether a class action may be certified under Fed. R. Civ. P. 23(b)(2) when monetary relief is also sought, and when the equitable relief predominates, is an important, unsettled issue of federal law that has not been decided, but should be settled by this Honorable Court, in light of its significance to class actions brought under consumer protection statutes, such as the Fair Credit Reporting Act.

The Advisory Committee Notes to Rule 23 suggest that monetary relief may be obtained in a Rule 23(b)(2) class action, where the predominant relief sought is injunctive or declaratory. *Allison v. Citgo*, 151 F.3d 402, 411 (5th Cir. 1998), and citations therein. The majority of the circuit courts have adopted the Advisory Committee's position, allowing monetary relief to be obtained in a Rule 23(b)(2) class action, so long as the predominant relief sought is injunctive or declaratory. *Allison v. Citgo, supra,* citing *Eubanks v. Billington*, 324 U.S. App. D.C. 41, 110 F.3d 87, 92 (D.C. Cir. 1997); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986); *In re School Asbestos Litigation*, 789 F.2d 996, 1008 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th

Cir. 1983); *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 72 L. Ed. 2d 177, 102 S. Ct. 1773 (1982); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968).

The Rule 23(b)(2) consumer class action certified by the District Court concerns standardized procedures, having largely uniform consequences to the members of the consumer class who seek relief. This action stands in contrast to the Title VII class actions which, prior to the 1991 revisions, were traditionally certified under Rule 23(b)(2). *Allison v. Citgo*, 151 F.3d at 409 (5th Cir. 1998). Since the 1991 revisions to Title VII, which provided for compensatory and punitive damages, Title VII cases have been found to be inappropriate for class certification, because the actions typically involve disputed practices which may be class-wide, but the consequences of the class-wide discrimination are anything but uniform. *Allison v. Citgo, supra.* This consumer class action, however, which alleges violations based on standardized procedures, having an essentially *uniform* effect on consumers, is another story.

After incorrectly finding that injunctive relief, and declaratory relief, are unavailable to consumers in this class action, the Fifth Circuit Court of Appeals then went a long way, around the wrong block, to find that it "is counterintuitive to say that in their case, declaratory relief, which might hypothetically be used as the basis for future action by the FTC, 'predominates' over monetary relief, which will directly and immediately benefit them." 199 F.3d 263, ___. However, the direct and immediate benefit *sought* by the consumers, as stated in the District Court's findings of fact, is precisely the equitable relief that the Fifth Circuit would deny to them.

A declaratory judgment in the consumers' favor in this action, even if it *did not* cause the FTC to seek an injunction, would directly benefit the consumers by deciding the merits of the liability issue in their claim, that defendants' procedures are inadequate, in violation of §1681e(a) of the FCRA. This judgment would provide a substantial benefit to the consumers, "whether or not further relief is or could be sought." The same judgment, if it were in defendants' favor, would provide a significant benefit to them.

The District Court made a fact finding under Fed. R. Civ. P. 23, that the predominant claim of the Petitioners, and of the class members they sought to represent, was for equitable relief to remedy respondents' inadequate procedures; and further, that plaintiffs' claims for statutory and punitive damages, were incidental. By "incidental," under the Fifth Circuit's reasoning in *Allison v. Citgo*, *supra,* the District Court means that the damages would be awarded as a consequence of a finding of liability, under the provisions of §1681n of the FCRA, and would not require separate, plaintiff-specific adjudications 178 F.R.D. 95, 100.

The District Court further found, again on the facts before it, that under the wide discretion afforded by Rule 23(c)(4), and (d), the action could be "maintained as a class action with respect to particular issues," through the decision of liability, and, if appropriate, the determination of an amount of statutory and punitive damages. The District Court held that subsequently, if liability were found, under the provisions of Rule 23(d), notice could be directed to the class members, to determine whether they wished to "opt-out" from the class award, and seek actual damages. The District Court correctly held that no issue considered by the fact-finder in determining liability would need to be reconsidered in determining actual damages, so that no Seventh

Amendment concerns would be raised. 180 F.R.D. 309, 314-15. The District Court held, on the facts before it, that it was unlikely that the actual damages suffered by any class member would exceed the provided-for statutory damages, due to the nature of the particular claims at issue. 178 F.R.D. 95, 101.

Importantly, the District Court found this action to be a 'negative value suit' which "thus poses exactly the type of collective-action problem for which the class action was devised." 180 F.R.D. 309, 315. This is particularly important in the context of consumer actions, where actual damages are often minimal, but the equitable relief sought is significant. The District Court correctly relied on this Court's teaching, in *Amchem v. Windsor*, 117 S.Ct. at 2246, that

> "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)."

It is important, in light of the explosive growth of information-gathering technology, that consumers have the means to seek class-wide equitable relief with respect to standardized practices, where the consequences are uniform, and the statutory provisions for compensatory damages are frequently minimal. The well-reasoned decisions of the District Court strike a careful balance between protecting the due process rights of litigants, and providing an economical means to resolve class-wide, uniform consumer violations

resulting from standardized practices. Petitioners respectfully submit that this Honorable Court's guidance with respect to this important issue can provide the basis for consumer protection in the developing world of information technology, by means of existing consumer protection laws.

Petitioners respectfully suggest that the issue, whether declaratory relief, adjudicating the merits of liability in a consumer class action, predominates over the statutory and punitive damages which come as an incident to a finding of liability, is an important, unsettled issue of federal law, which should be decided by this Honorable Court.

CONCLUSION

As noted above, this Petition for Certiorari presents an inordinate number of questions for review, due to the novel and circuitous route taken by the Fifth Circuit Court of Appeals, to reverse and vacate the well-reasoned decisions of the District Court.

The Fifth Circuit leaps this Court's Article III standing precedents, thoughtfully explained by the District Court, by the novel requirement that a litigant show actual harm under §1681b in order to bring an equitable action under §1681e(a). By the same novel holding, the Fifth Circuit deftly sidesteps this Court's holdings in *Ortiz v. Fibreboard, supra,* and *Amchem v. Windsor, supra*, that in a class action, the Rule 23 inquiry is logically antecedent to the Article III standing inquiry.

The Fifth Circuit disregards this Court's precedents, as well as the legislative history of the FCRA and the contemporary context in which it was enacted, to find injunctive relief unavailable to the class members. Then, in

an interpretation of Fed. R. Civ. P. 23(b)(2) which is again novel, and contrary to the plain language of the Rule, the Fifth Circuit holds that a class seeking declaratory relief may not be certified, if injunctive relief is not also available to the class. This holding does away with declaratory relief for the class, thwarting the purposes of the Declaratory Judgment Act, despite this Honorable Court's decisions interpreting the Declaratory Judgment Act as a remedial statute intended to *expand* the relief available to litigants. *Zwickler v. Koota,* 389 U.S. 241, 88 S. Ct. 391, 19 L.Ed. 2d 444 (1967); *Wilton v. Seven Falls, supra.*

Having thus disposed of equitable relief for the class members, the Fifth Circuit then decides that even if equitable relief were available, it would not predominate over the monetary relief sought, in spite of the District Court's specific factual findings to the contrary. This effectively leaves consumers without a remedy against class-wide standardized practices which threaten imminent harm, until *after* they are harmed. Then, the consumers must individually seek damages, where the cost of individual litigation is likely to exceed the benefits obtained.

Petitioners submit that this Honorable Court's decision in this action is important to the needs of consumers, and commerce. Both require that existing consumer protection laws function as they were intended, in the context of mass, standardized electronic transactions. The development of electronic commerce depends on information-gathering technology that responsibly serves the needs of business, while allowing consumers to maintain confidence in their financial privacy. The existing consumer protection laws, such as the Fair Credit Reporting Act at issue here, are adequate, so long as they are enforced as written, and not circumscribed with restrictions that Congress never intended.

Petitioners respectfully suggest that this Honorable Court grant certiorari to decide the important questions presented herein.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Decided January 7, 2000]

No. 98-31209

BERNITA WASHINGTON; KEVIN WASHINGTON; PEGGY MALBROUGH; ROY MALBROUGH, JR; BERNICE AUGUSTINE GUICHARD; VERNON GUICHARD, JR,
Plaintiffs - Appellees,

v.

CSC CREDIT SERVICES INC; EQUIFAX CREDIT INFORMATION SERVICES INC,
Defendants-Appellants.

OPINION

JUDGES: Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiffs-appellees Bernita and Kevin Washington (the "Washingtons"), Peggy and Ray Malbrough (the "Malbroughs'), and Bernice and Vernon Guichard (the "Guichards") (collectively, the "consumers") allege that defendants-appellants CSC Credit Services, Inc. ("CSC") and Equifax Inc. "Equifax") (collectively, the "reporting agencies") violated the Fair Credit Reporting Act ("FCRA" or "the Act"). The district court certified the consumers as class representatives and the reporting agencies challenge this ruling. We reverse in part, vacate in part, and remand.

I

The consumers brought suit against the reporting agencies for failing to "maintain reasonable procedures" before providing their credit reports to insurance companies. They seek statutory, compensatory, and punitive damages, as well as attorney fees and prejudgment interest. Additionally, they request declaratory and injunctive relief "ordering defendants to desist from providing credit reports to insurers in connection with claims investigations."

The district court initially certified the class under Federal Rule of Civil Procedure 23(b)(2). *See Washington v. CSC Credit Servs., Inc.*, 178 F.R.D. 95, 103 (E.D. La. 1998). The court subsequently denied Equifax's motion for reconsideration, but in doing so, the court amended the class definition[1] and alternatively certified the class under Rule

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[1] The final class definition was:

> all persons whose credit reports have been furnished to an insurance company during the

23(b)(3). *See Washington v. CSC Credit Servs., Inc.*, 180 F.R.D. 309, 312-16 (E.D. La. 1998).

II

We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). We review the district court's decision to certify the class for an abuse of discretion. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998). However, we review *de novo* whether the district

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> period from April 2, 1995 to the present, by computer access, by defendants CSC Services, Inc., or Equifax, Inc., or any of their subsidiaries, or by access to databases owned by any of them, where the consumer reporting agency assembling and/or furnishing the report(s) did not receive:
>
> 1) an initial blanket certification from the insurance company stating i) a permissible purpose for which the credit report is sought, ii) that the credit report will be used for no other purpose, and iii) that the insurance company is expressly prohibited from sharing the credit report or providing it to anyone else, other than the subject of the report or a joint user having the same purpose, and
>
> 2) a separate certification from the insurance company for each credit report requested stating that the report was only to be used for a permissible purpose.

Washington v. CSC Credit Servs., Inc. 180 F.R.D. 309, 315-16 (E.D. La. 1998).

court applied the correct legal standard to grant certification. *See id.*

To proceed as a class, plaintiffs must first meet the four requirements set forth in Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to
the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy]." Fed. R. Civ. P. 23(a). Then, the plaintiffs must show that the action is maintainable as a class action under one of Rule 23(b)'s subsections. *See generally Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (noting that plaintiffs have the burden of showing that certification is appropriate).

The district court found that the consumers satisfied the Rule 23(a) prerequisites and certified the class under both Rule 23(b)(2) and 23(b)(3). To maintain a class action under Rule 23(b)(3), plaintiffs must show: (1) that "common questions . . . predominate over any questions affecting only individual members" ("predominance"); and (2) that "class resolution [is] superior to other available methods for the fair and efficient adjudication of the controversy" ("superiority"). *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 623-24 (5th Cir. 1999) (internal quotations omitted) (*quoting Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, (1997)). To maintain a class action under Rule 23(b)(2), plaintiffs must show that the

"predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 411.

The reporting agencies argue that the consumers do not have individual standing to bring FCRA claims, do not meet the "typicality" and "commonality" requirements of Rule 23(a), cannot maintain an action under Rule 23(b)(3) because they cannot show "superiority" or "predominance," and cannot maintain an action under Rule 23(b)(2) because the FCRA does not allow them to obtain injunctive relief. Resolution of these arguments depends on whether the district court properly interpreted the FCRA.

A

Enacted in 1970, the FCRA governs "consumer reporting agencies" like Equifax and CSC which maintain credit information on consumers and provide it to third parties. *See* 15 U.S.C. § 1681 (stating the purpose of the FCRA); *id.* § 1681a(f) (defining "consumer reporting agencies"). A central purpose of the Act is to ensure the "confidentiality, accuracy, relevancy, and proper utilization of [consumers' credit] information." *Id.* § 1681(b).

Section 1681b of the Act specifies the two instances in which a reporting agency may provide consumer reports to an insurance company: (1) when the consumer consents in writing; and (2) when the agency "has reason to believe" that the insurance company "intends to use the information in connection with the underwriting of insurance involving the consumer." *Id.* § 1681b(a). To ensure that agencies do not provide reports outside these two circumstances, § 1681e(a) requires reporting agencies to "maintain reasonable

procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title." *Id.* § 1681e(a);[2] *see also* 16 C.F.R. pt. 600 app. § 607 (stating FTC commentary on "reasonable procedures").

The crucial issue in this case is whether a plaintiff can bring an action for failure to "maintain [the] reasonable procedures" required by § 1681e(a) without first showing that a report was disclosed in violation of § 1681b. The district court found that a plaintiff claiming a violation of § 1681e

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[2] In its entirety, § 1681e(a) states:

> Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title. *Id.* Section 1681c, which is not at issue in this case, mandates that certain material be included in reports and excludes other material from reports.

does not need to show improper disclosure in violation of § 1681b, but instead only needs to show that the reporting agency did not maintain the required reasonable procedures and that it released a report to an insurance company. *See Washington*, 178 F.R.D. at 99-100.

The only other two courts which have considered this issue disagree with the district court's interpretation of § 1681e. In *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998), the court found that where a "disclosure was made for a permissible purpose [under § 1681b], then the inquiry ends, and no investigation of the reasonableness of the consumer reporting agency's procedures are necessary." *Id.* at 1067. The court reasoned that "it makes no sense for a consumer whose file was disclosed only for permissible purposes to nevertheless be able to challenge the reasonableness of the consumer reporting agency's procedures." *Id.* Similarly, in *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Ga. 1976), the court endorsed the proposition that, "once it is shown that the information was relevant and for a permissible purpose, this court need not inquire into the reasonableness of the underlying procedures adopted by the agency to assure that the information will be furnished for purposes defined as permissible under the Act." *Id.* at 1016.

We find these cases persuasive. Section 1681e(a) requires reporting agencies to "maintain reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under section 1681b." 15 U.S.C. § 1681e(a). As the above-cited courts reason, this purpose is not furthered

unless a plaintiff suffers the harm the procedures are meant to prevent.

Similarly, Congress has stated that it adopted the "reasonable procedures" requirement to "meet[] the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 18 U.S.C. § 1681(b) (emphasis added). Congress identified actual injuries – including breaches of "confidentiality" and "improper utilization" – which only occur if there is an improper disclosure, suggesting that a general claim of improper procedures is by itself inadequate. *Id.*

In light of the purposes of the FCRA, we find that the actionable harm the FCRA envisions is improper disclosure, not the mere risk of improper disclosure that arises when "reasonable procedures" are not followed and disclosures are made. Accordingly, a plaintiff bringing a claim that a reporting agency violated the "reasonable procedures" requirement of § 1681e must first show that the reporting agency released the report in violation of § 1681b.[3]

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[3] This reading finds support in cases interpreting a related part of § 1681e. Section 1681e(b) also has a "reasonable procedures" provision, requiring agencies "to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* § 1681e(b). Courts applying § 1681e(b) uniformly limit recovery to cases where the failure to follow procedures causes actual harm (*i.e.*, release of an inaccurate report) to the consumer. *See Peller v. Retail Credit Co.*, [1974-1980 Transfer Binder] Consumer Cred. Guide (CCH) P

The consumers cite no contrary authority interpreting § 1681e. Instead, they make a plain language argument, quoting language from the civil liability provisions of the FCRA which holds reporting agencies liable for "failing to comply with any requirement imposed under this subchapter." 15 U.S.C. §§ 1681n, 1681o. The consumers argue that

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94,648 (N.D. Ga. Dec. 6, 1973) ("In order to pursue a cause of action based upon a willful or negligent violation of 15 U.S.C. § 1681e(b), the report sought to be attacked must be inaccurate. "), *aff'd* No. 74-1284 (5th Cir. Dec. 10, 1974); *Spence v. TRW, Inc.*, 92 F.3d 380, 382 (6th Cir. 1996) (rejecting a claim of failure to follow "reasonable procedures" under 1681e(b) because "[a] showing of inaccuracy is an essential element of a claim under the Fair Credit Reporting Act"); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) ("In order to make out a *prima facie* violation under § 1681e(b), a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information."); *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994) (same); *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991) (same); *Koropoulos v. Credit Bureau, Inc.*, 236 U.S. App. D.C. 136, 734 F.2d 37, 39 (D.C. Cir. 1984) (same). These cases actually read the "reasonable procedures" requirement as a limit on liability that might otherwise attach for inaccurate reports, rather than as an affirmative basis for a claim. *See, e.g., Henson*, 29 F.3d at 284 ("The credit reporting agency is not automatically liable even if the consumer proves that it prepared an inaccurate credit report because the FCRA does not make reporting agencies strictly liable for all inaccuracies. A credit reporting agency is not liable under the FCRA if it followed 'reasonable procedures to assure maximum possible accuracy,' but nonetheless reported inaccurate information in the consumer's credit report.") (quotations and citation omitted).

because maintaining reasonable procedures is a requirement under § 1681e(a), the FCRA imposes liability for a failure to comply with this requirement. We disagree. The language in § 1681e(a) indicates – by qualifying the purpose of the procedural requirement – that the "requirement imposed under" § 1681e(a) is maintaining "reasonable procedures" in order to prevent improper disclosures. *See, e.g., id.* § 1681e(a) ("No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.").

B

In sum, the district court erroneously ruled that the consumers need not show that their reports were improperly disclosed under § 1681b in order to maintain their claims under § 1681e. This error requires us to vacate in part the certification ruling, as the error formed the basis for the district court's findings that the consumers have individual standing, that they satisfy the prerequisites of Rule 23(a), and that they can maintain a class under Rule 23(b)(3). However, we reverse the part of the district court's decision certifying the class under Rule 23(b)(2), because we find that the consumers cannot maintain a class action under this subsection. *See* Fed. R. Civ. P. 23(b)(2) (allowing a class action where "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" is appropriate).

The district court certified this action under Rule 23(b)(2) primarily because the consumers are pursuing injunctive relief. The reporting agencies argue that the FCRA does not allow private litigants to obtain injunctive relief.

In general, "absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 548 (5th Cir. 1993) (alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S. Ct. 2545, 2559, 61 L. Ed. 2d 176, (1979)). Thus we must consider whether Congress" clearly and unambiguously limited the court's equity jurisdiction" under the FCRA. *Id.*

Section 1681p gives us jurisdiction over "an action to enforce any liability created under this subchapter." 15 U.S.C. § 1681p. The term "liability" is discussed in the FCRA's civil liability provisions, both of which expressly refer to damages and attorney fees without mentioning injunctive relief. *See* 15 U.S.C. §§ 1681n-1681o. This omission is significant because the Act elsewhere expressly grants the power to obtain injunctive relief to the FTC. *See id.* § 1681s(a) ("Compliance with the requirements imposed under [the FCRA] shall be enforced under the Federal Trade Commission Act . . . by the Federal Trade Commission."); 15 U.S.C. § 45(b) (stating, in a provision of the FTC Act, that the FTC can compel parties to "cease and desist" from committing certain acts); *cf. id.* § 1681s(b) (allowing other agencies to enforce the FCRA in certain circumstances).

Lower courts are split as to whether, in light of these provisions, the FCRA allows private litigants to maintain a claim for injunctive relief. Compare *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (holding that it lacked the power to grant a private litigant's request for injunctive relief under the FCRA); *Ditty v. Checkrite, Ltd.*, 973 F. Supp. 1320, 1338 (D. Utah 1997) (same); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284-85 (S.D. Fla. 1995) (same); *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 668 (W.D. Pa. 1974) (same) with *Andrews*, 7 F. Supp. 2d at 1084 & n.33 (concluding that the FCRA "does allow injunctive relief on the plaintiff's own behalf"); *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092, 1096-97 (D. Ariz. 1974) (certifying a class action on a claim for injunctive relief under the FCRA and granting preliminary injunctive relief), *aff'd* on other grounds 524 F.2d 1145 (9th Cir. 1975). We hold that the affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.[4]

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[4] Courts have adopted a similar reading of analogous provisions of the Fair Debt Collection Practices Act ("FDCPA"). The FDCPA contains a similar civil liability provision to the FCRA, mentioning money damages but not injunctive relief, *see* 15 U.S.C. § 1692k, and it contains a similar provision regarding the FTC's enforcement authority, *see id.* § 1692l. Based on these two sections, courts applying the FDCA have held that it does not allow private actions for injunctive relief. *See Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830, 834 (11th Cir. 1982) (stating in dictum, without analysis, that "equitable relief is not available to an

This reading is supported by the subsequently-enacted § 1681u, which requires reporting agencies to disclose consumer information to the FBI "for counterintelligence purposes." 15 U.S.C. § 1681u. Section 1681u provides consumers with a damages remedy against the government for improperly obtaining information, *see id.* § 1681u(i), and it specifies that, "in addition to any other [damages or attorney fees] remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section," *id.* § 1681u(m). Thus, where Congress intended to allow private injunctive relief under the FCRA, it expressly stated that this relief was available. This language would be unnecessary if injunctive relief were otherwise available.[5] *See*

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individual under the civil liability section of the Act"); *Zanni v. Lippold*, 119 F.R.D. 32, 33-34 (C.D. Ill. 1988) (finding that the FDCPA did not allow individual litigants to obtain injunctive relief); *Strong v. National Credit Management Co.*, 600 F. Supp. 46, 46-47 (E.D. Ark. 1984) (same); *Duran v. Credit Bureau of Yuma*, 93 F.R.D. 607, 608-09 (D. Ariz. 1982) (same).

[5] The district court made a similar argument in support of its contrary ruling by citing § 1681s-2, which imposes a duty on "furnishers of information" to provide accurate information to consumer reporting agencies. *See id.* § 1681s-2(a). Section 1681s-2(d) grants the FTC exclusive enforcement power over this subsection. The district court apparently relied on the lack of similar language in § 1681e to argue that Congress could not have intended the FTC to have exclusive enforcement authority over § 1681e. We agree with this reasoning, but it does not address the question at issue here, which is not whether the FTC has exclusive enforcement authority over all of § 1681e (which it plainly does not), but rather whether the FTC has the exclusive ability to obtain one type of remedy (injunctive relief) available under § 1681e.

Kashanchi v. Texas Commerce Medical Bank, N.A., 703 F.2d 936, 939 (5th Cir. 1983) (noting the importance of giving effect to all language in a statute).

2

The district court alternatively found that the consumers could maintain a class action under Rule 23(b)(2) for declaratory relief because the reporting agencies acted in a way which made "injunctive relief or corresponding declaratory relief" appropriate. Fed. R. Civ. P. 23(b)(2). The Advisory Committee states that "declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Fed. R. Civ. P. 23 advisory committee's note. The district court reasoned that declaratory relief in this case fit within this definition because it could "serve[] as a basis for later injunctive relief" to the FTC. *Washington*, 180 F.R.D. at 312.

This application of Rule 23(b)(2) would frustrate the FCRA's limitation of injunctive relief to the FTC. Unable to obtain injunctive relief directly, consumers could attempt to obtain it indirectly by obtaining declaratory relief solely for the purpose of later prompting the FTC to move for injunctive relief.

More importantly, to maintain an action under Rule 23(b)(2), declaratory relief rather than monetary damages must be the "predominant" form of relief the plaintiffs pursue. *See Allison*, 151 F.3d at 411. "Monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. This

means that monetary damages must "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief" and must not depend "on the intangible, subjective differences of each class member's circumstances" or "require additional hearings to resolve the disparate merits of each individual's case." *Id.* The consumers are seeking actual and punitive damages. It is counterintuitive to say that in their case, declaratory relief, which might hypothetically be used as the basis for future action by the FTC, "predominates" over monetary relief, which will directly and immediately benefit them. Additionally, because the money damages in this case do not flow from the declaratory relief but require separate adjudication, they predominate under *Allison*. Accordingly, the district court erred in finding that the class could be maintained under Rule 23(b)(2).

III

Because we find that the consumers cannot maintain a class action under Rule 23(b)(2), we REVERSE the district court's certification on this grounds. Additionally, because the district court's class certification under Rule 23(b)(3) was based on its misreading of the FCRA, we VACATE its Rule 23(b)(3) certification and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

[Filed March 11, 1998]

NO. 97-0971

BERNITA WASHINGTON, ET AL
Plaintiffs,

v.

CSC CREDIT SERVICES, INC. AND EQUIFAX INC.
Defendant,

March 12, 1998, Entered

OPINION: ORDER AND REASONS

This matter is before the Court on a motion by plaintiffs "to certify a class of all persons whose credit reports have been furnished to an insurance company during the period from April 2, 1995 to the present, by computer access, by defendants CSC Services, Inc., or Equifax Inc., or any of their subsidiaries, or by access to databases owned by any of them," Plaintiffs' Motion to Certify Class, Record Document No. 34, and a Motion for Summary Judgment by Equifax Inc.

Named as representative plaintiffs are Bernita Washington, Kevin Washington, Peggy Malbrough, Roy Malbrough, Jr., Bernice Augustine Guichard, and Vernon Guichard, Jr. It is alleged that defendants, CSC Credit Services, Inc. and Equifax Inc, failed to adopt reasonable procedures to ensure that credit reports were being issued for a permissible purpose in violation of Section 1681e of the Fair Credit Reporting Act, ("FCRA"), 15 U.S.C. § 1681 *et seq.*

I. The Fair Credit Reporting Act

A. Introduction

The FCRA was enacted in 1970 to ensure that:

> consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681(b).[1]

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[1] The FCRA was based upon the following Congressional findings:

> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports

B. Permissible Purposes

Section 1681b of the FCRA establishes that:

> A consumer credit agency may furnish a consumer report under the following circumstances and no other: . . .
>
> (2) In accordance with the written instructions of the consumer to whom it relates.
>
> . . .
>
> (3) To a person which it has reason to believe - (C) intends to use the information in connection with the underwriting of insurance involving the consumer. (emphasis added)

> directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
> (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a).

15 U.S.C. § 1681b(a).

The Federal Trade Commission promulgates rules under this statute. The commentary to those rules reads as follows:

> 2. Claims
>
> An insurer may not obtain a consumer report for the purpose of evaluating a claim (to ascertain its validity or otherwise determine what action should be taken), because permissible purposes relating to insurance are limited by this section to "underwriting" purposes.

(emphasis added) 16 C.F.R. Ch. 1, Subchapter F-Statements of General Policy or Interpretation under the Fair Credit Reporting Act (1-1-95 edition)(hereinafter "FTC Commentary"), p. 386.

C. Reasonable Procedures

Section 1681e(a) of the FCRA states that:

> Every consumer reporting agency shall maintain reasonable procedures to . . . limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the

> information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title. 15 U.S.C. @ 1681e(a).

Elaborating on this provision, the Federal Trade Commission Commentary states:

> Section 607--Compliance Procedures
> 2. Procedures to Avoid Reporting for Impermissible Purposes
>
> B. Required certification by user
> . . . The user's certification that the report will be used for no other purposes should expressly prohibit the user from sharing the report or providing it to anyone else, other than the subject of the report or to a joint user having the same purpose. A consumer reporting agency should refuse to provide reports to those refusing to provide such certification.
>
> C. Blanket or individual certification
> . . . In furnishing reports to users that typically could have both permissible and impermissible

> purposes for ordering consumer reports . . . , the consumer reporting agency must require the user to provide a separate certification each time it requests a consumer report. (emphasis added) 16 C. F.R. Ch. 1, Subchapter F-Statements of General Policy or Interpretation under the Fair Credit Reporting Act (1-1-95 edition), p. 396-97.

D. Summary

Summarizing the relevant requirements of the FCRA, credit reporting agencies such as defendants are required to maintain reasonable procedures to limit the furnishing of credit reports to permissible purposes. 15 U.S.C. § 1681e(a). In order to comply with this statutory duty with regard to insurance companies, a credit reporting agency:

1) May not furnish credit reports to insurers to the purposes of claims investigations or any purpose not related to underwriting. FTC Commentary at 390.

2) Must obtain certifications from insurance companies to which they make credit reports available which expressly prohibit the insurance companies from sharing the credit reports or providing them to anyone other than the subject of the report or to a joint user having the same purpose. FTC Commentary at 395.

2) Must require the user insurance companies to submit a separate certification for each credit report they obtain. FTC Commentary at 396.

II. Class Certification

A. Introduction

In deciding whether to certify a class, the court must perform a rigorous analysis of whether the class satisfies Federal Rule of Civil Procedure 23. *General Telephone Co. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982). However, the court may not inquire into the merits of the underlying case. *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111 (D. Kan. 1995). The court must assume that the substantive allegations of the complaint are true.[2] *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978).

B. Rule 23(a)

The prerequisites to class certification are numerosity, typicality, commonality, and fair and adequate representation. Fed. R. Civ. P. 23(a).

Defendants maintain that class certification is inappropriate here because the users of the reports, the insurance companies, have obtained written authorizations from consumers permitting them to obtain the reports. Defendants maintain that any argument that the written

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[2] Defendants' contention that plaintiffs must amend their complaint in order to change the definition of the putative class is incorrect. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 183-84, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)(Douglas, J., dissenting).

authorizations were invalid – because, for example, they were accompanied by verbal or other misrepresentations – would require a fact-specific inquiry that would destroy the commonality, typicality, and perhaps also the numerosity required for the maintenance of a class action.

Plaintiffs respond that issue is not whether the users ultimately obtained valid authorizations, but rather whether the defendants maintained reasonable procedures to ensure that users were obtaining those authorizations. Specifically, plaintiffs allege that apart from obtaining an initial blanket certification from the insurance companies, defendants have exercised no oversight over the insurance companies to ensure that the reports are being used for proper purposes. Motion to Certify at 3. They further allege that any written authorizations from the consumers that may have been given to the insurance companies were never transmitted to defendant CSC Credit Services, Inc. Plaintiff's Reply to Opposition of Equifax Inc. to Motion to Certify at 7. Ultimately, plaintiffs contend that it was not reasonable under Section 1691e(a) for defendants to rely solely on the insurance companies' initial assertions they have authorizations, and that further certifications and safeguards are required.

The Court concurs with the plaintiff's formulation of the issue. A credit reporting agency's duty to maintain reasonable procedures under Section 1691e(a) of the FCRA is separate and distinct from, and independent of, a user's duties, which are addressed in Section 1681m, a different section of the Act. The fact that the user insurance companies may have fortuitously procured authorizations from consumers does not absolve the defendant credit reporting agencies of their duties under Section 1681e(a). As discussed

above, those duties include receiving certifications from insurance companies that the reports are not being shared, and also obtaining a certification for every credit report issued to an insurance company. An inquiry into whether defendants have complied with these statutory duties does not require an individualized inquiry into the circumstances surrounding each plaintiff's interaction with each insurance company and, as discussed below, is appropriate for class certification.

1. Numerosity

For class certification to be appropriate, membership in the class must be so numerous that joinder is impracticable. Fed. R. Civ. P. 23(a). A court may make common sense assumptions as to the size of the proposed class. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

Defendants maintain that numerosity may be lacking because the class consists only of those consumers for whom a report was issued in violation of the FCRA. They assert that determining whether a report was issued for improper purposes would require individual determinations. Opposition by Equifax to Plaintiff's Motion to Certify Class at 8 (Record Doc. No. 28).

The pertinent question, however, is whether the defendants utilize reasonable procedures with regard to the insurance companies. The class of people affected consists of those consumers whose reports were released under these allegedly improper procedures. Plaintiffs have produced affidavits stating that defendant CSC has furnished the credit reports of approximately 230 consumers to insurance companies, Exhibit 2, Motion to Certify Class (Record

Document 34, in alleged violation of the reasonable procedures requirements of the FCRA. Joinder is impracticable for a class with this many members.

2. Commonality and Typicality

"The commonality and typicality requirements of Rule 23 tend to merge." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 2369, 72 L. Ed. 2d 740, 749 (1982). Commonality exists "when there is at least one issue the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso*, 118 F.3d 421, 1997 U.S. App. LEXIS 19933 (5th Cir. 1997).

Here, all plaintiffs claim an identical violation of the FCRA – that the defendants failed to adopt reasonable procedures as required by Section 1691e(a). Resolution of this issue would either change or not change the manner in which plaintiffs' credit reports are distributed, and thus would "affect all or a significant number of the putative class members" and meet the requirements of Rule 23a as delineated by *Lightbourne*.

3. Adequacy of Representation

Adequacy of representation analysis "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231, 2236 (1997).

The named parties and the remaining class members here seek identical relief. As discussed in the section on damages, infra, because there are no defenses unique to the representative plaintiffs, the representation is adequate.

C. Rule 23(b)(2)

Plaintiffs claim relief under Fed. R. Civ. P. 23(b)(2), or in the alternative, under Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(2) allows class actions for declaratory or injunctive relief "where the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) "Class certification under Rule 23(b)(2) does not automatically preclude an award of monetary damages when the primary relief sought is injunctive or declaratory." *Forbush v. J.C. Penney*, 994 F.2d 1101, 1105, n.3 (5th Cir. 1993), *citing Parker v. Local Union No. 1466*, 642 F.2d 104, 107 (5th Cir. 1981) and *Johnson v. General Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979).

Following an approving citation to *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975), which reversed a denial of class certification in a suit seeking compensatory and punitive damages as well as injunctive and declaratory relief, Professor Herbert Newberg states:

> When the parties dispute which form of relief is predominant with respect to the appropriateness of Rule 23(b)(2) for any class certification, it is counterproductive for the

> court to expend time to try to resolve this largely discretionary question, which does not address the merits of the case. Rather, the court should conclude that when the Rule 23(a) prerequisites are satisfied and declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members.

1 Newberg on Class Actions § 4.14 (3d ed. 1992).

Plaintiffs seek declaratory and injunctive relief with regard to defendants' failure to maintain reasonable procedures to safeguard plaintiff's credit reports, and also statutory damages as permitted by the FCRA[3]. Defendants contend that plaintiffs are not primarily seeking equitable

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[3] Plaintiffs' amended complaint states that:

> Plaintiff amends the prayer of her complaint to pray for judgment against defendant Equifax Inc., in addition to her prayer for judgment against CSC, including in her prayer a request for declaratory and injunctive relief pursuant to 28 U.S.C. 2201, ordering defendants to desist from providing credit reports to insurers in connection with claims investigations.

Paragraph 8, Plaintiff's Amended Complaint.

relief and that therefore a Rule 23(b)(2) action is inappropriate.

Here, the primary form of relief sought by plaintiffs is equitable, Plaintiffs' predominant claim is for injunctive relief against defendants' allegedly unreasonable procedures, with claims for statutory damages, including punitive damages and attorneys' fees, coming as an incident. While it is true that the FCRA also specifically allows for actual damages, 15 U.S.C. § 1681o(a), based on the affidavits and factual assertions in the record – in particular the defendants' claim, unrebutted by plaintiffs, that most plaintiffs granted authorizations to the insurance companies to procure their reports – the Court finds that compensatory damages are not likely to form a predominant part of the recovery. As such, the relief sought by plaintiffs is primarily equitable.

III. Damages

Actual damages need not be proven in an action seeking punitive damages for willful violation of the FCRA. *Casella v. Equifax Credit Information Services,* 56 F.3d 469, 475 (2d Cir. 1995); *cf. Scalise v. National Utility Service*, 120 F.2d 938, 940 ("in Florida, as in the federal courts, the giving of punitive damages is not dependent on, nor must it bear any relation to, the allowance of actual damages.") Moreover, humiliation and distress can constitute actual damages under the FCRA, even if the consumer has suffered no out-of-pocket losses. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) *Citing Pendleton v. Trans Union Systems Corp.*, 76 F.R.D. 192 (E.D. Pa.1977), defendants contend that some indication of the fact of damage, as

opposed to the amount of damages or proof of damages, is also required.

Defendants' attempted distinction is inapposite. In *Pendleton*, plaintiffs sued over inaccuracies in their credit reports. In finding that proof of the "fact of damage" was required, the court noted that "it is important to emphasize that these individual factual determinations enter into proving the defendant's liability, not simply the amount of an individual's damages." *Pendleton* at 194. Here, no individual factual determinations enter into proving defendants liability, as it hinges solely on whether defendants observed reasonable procedures with regard to insurance companies.

The deeper question, not significantly briefed by either party, is that of constitutional standing. Defendants contend that plaintiffs lack standing because they have suffered no injury in fact. In order to possess standing, a plaintiff must have among other things suffered an injury-in-fact, which has been defined as "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), *quoting Whitmore v. Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)). An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. *See Lujan* at 573-76.

Unlike the endangered species protection statute in *Lujan*, which granted the right to sue to an unqualified "any person," the FCRA does not create an interest shared generally with the public at large. Rather, it targets a particular class of consumers, and additionally provides a *quid*

pro quo by limiting the liability of credit reporting agencies, 15 U.S.C. 1681h(e), in exchange for the restrictions imposed upon them. Thus the concern voiced in *Lujan* over permitting the public at large to sue over generalized grievances does not apply.

Moreover, while defendants contend that plaintiffs have not been harmed because the issuance of the reports has not resulted in a denial of credit to the named plaintiffs, the mere issuance of the reports themselves under improper procedures constitutes an invasion of privacy if not under the common law, then at least as contemplated by the FCRA.[4] In an era where information is instantly transmissible and

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[4] "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 513, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

The FCRA is not solely concerned with damage resulting from inaccurate reports. In the section of the FCRA entitled "Congressional findings and statement of purpose," Congress determined that "there is a need to insure consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4)(emphasis added). The statute later states that "it is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information with regard for the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter. 15 U.S.C. § 1581(b) (emphasis added).

easily shared, and where credit reports can determine a person's access to a wide range of goods and services, having one's credit history released into electronic circulation without reasonable procedures in place to ensure permissible use is cause for sufficient anxiety and invasion of privacy to constitute an injury-in-fact in and of itself.

Alternatively, representative plaintiffs Bernice Augustine Guichard and Vernon Guichard, Jr. have alleged that the credit reports obtained under the procedures in question were used by insurance companies "to embarrass and humiliate claimants, and to induce them to accept inadequate compensation for their claims, or as a basis for denying claims together."[5] Plaintiffs here quite clearly allege an injury-in-fact.

IV. Statute of Limitations

Defendants contend that the claims of some or all of the claims of the putative class members may be time-barred. The putative class includes "all persons whose credit reports have been furnished to an insurance company during the period from April 2, 1995 to the present, by computer access, by defendants CSC Services, Inc., or Equifax Inc., or any of

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[5] These allegations were made by the Guichards in paragraph 16 of their Class Action Complaint in *Guichard v. State Farm Fire and Casualty Co.*, Civ. A. 95-2963, a related action which caused the current action to be transferred to this section of court. The defendants in their memoranda have frequently relied on *Guichard* and other FCRA actions involving the plaintiffs at hand. The Court grants leave to plaintiffs to file the *Guichard* affidavit into the record.

their subsidiaries, or by access to databases owned by any of them." This action was filed on April 2, 1997, and the applicable statute of limitations is two years. 15 U.S.C. § 1681p. The cause of action accrues at the earliest on the date of injury, which here, again at the earliest, would be the date on which the defendants released credit reports to an insurance company without the Section 1681e reasonable procedures in place. As the class includes only those plaintiffs whose reports were furnished from April 2, 1995, the class members' claims are not time-barred.

V. Class Definition

As currently formulated, plaintiffs' class definition is too broad, as it is not tailored to the defendants' alleged violation, namely, their failure to observe reasonable procedures under Section 1681e(a) when issuing reports to insurance companies. District courts have wide authority to manage class actions by trimming down, limiting, or partially denying proposed classes, creating subclasses, and imposing conditions on class certification.[6]

Accordingly, the Court trims down plaintiffs' class definition from all persons whose credit reports have been furnished to an insurance company during the period from April 2, 1995 to the present, by computer access, by defendants CSC Services, Inc., or Equifax Inc., or any of their subsidiaries, or by access to databases owned by any of them to all persons whose credit reports have been furnished

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[6] *Slaughter v. Levine*, 598 F. Supp. 1035, 1041 (D. Minn. 1985)(rev'd on other grounds).

to an insurance company during the period from April 2, 1995 to the present, by computer access, in violation of 15 U.S.C. 1681e(a), by defendants CSC Services, Inc., or Equifax Inc., or any of their subsidiaries, or by access to databases owned by any of them.

VI. Equifax's Motion for Summary Judgment

Defendant Equifax Inc. moves for summary judgment on the grounds that it has been improperly named as a defendant in this action. The proper defendant in the Equifax family of companies, if any, Equifax Inc. claims, is its subsidiary Equifax Credit Information Services.

Plaintiffs provide an exhibit of a credit report allegedly furnished by an Equifax company to an insurer which identifies the provider as "Equifax and affiliates."

The Court finds that at this point in time a question of material fact sufficient to defeat a motion for summary judgment exists as to whether Equifax Inc. is the proper defendant.

Accordingly,

IT IS ORDERED that plaintiffs' Motion to Certify Class is GRANTED, and that the Motion for Summary Judgment by Equifax Inc. is DENIED without prejudice to the right to reurge it at a later date.

3/11/98

Helen G. Berrigan

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

[Filed July 8, 1998]

NO. 97-0971

BERNITA WASHINGTON, ET AL
Plaintiffs,

v.

CSC CREDIT SERVICES, INC. AND EQUIFAX INC.
Defendant,

OPINION: ORDER AND REASONS

This matter is before the Court on a Motion for Reconsideration by defendant CSC Credit Services, Inc. ("CSC") (Record Document No. 49), and a Motion for Reconsideration, by defendant Equifax, Inc. ("Equifax") (Record Document No. 48), requesting that the Court reconsider its Order and Reasons entered on March 12, 1998 and that the Court deny plaintiffs' Motion to Certify Class. For the reasons below, defendants' motions are denied.

1. Motion for Reconsideration

Federal Rule of Civil Procedure 54(b) permits review of a judgment which disposes of some, but not all claims, in an action. A motion to reconsider a ruling on a pre-trial motion, filed within ten days from the Court's adverse ruling, is analogous to motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). *See Smith v. Compass Rose Services, Inc.*, 1998 U.S. Dist. LEXIS 2496, 1998 WL 92283 at *1 (E.D. La. Mar. 2, 1998). As defendants' motions were filed within ten days of the ruling and the ruling did not dispose of all of the plaintiffs' claims, the motions will be deemed motions to alter or amend.[1]

A decision will be altered or amended upon the movant's showing of: (1) an intervening change of controlling law; (2) the availability of new evidence; and/or (3) the need to correct a clear and manifest error of fact or law. *See Russell v. Delco Remy Division of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995); *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 n.16 (5th Cir. 1993). Rule 59(e) motions to alter or amend are not the appropriate forum for arguments that should or could have been urged in the original opposition memorandum. *See LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995); *Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997); Fed. R. Civ. P. 59(e). Thus, because the defendants fail to identify manifest errors of law or fact,

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[1] The tenth day following the entry of the order was Sunday, March 22, 1998. Equifax's motion was filed Monday, March 23, 1998. CSC's motion, filed two days later, is in a strict sense untimely, but as it essentially only seconded the points raised by Equifax, it will be examined here by the Court.

present new evidence, or specify an intervening change in the law, defendants' motion to alter or amend does not provide sufficient grounds to grant the requested relief.

However, for purposes of clarity, the Court will briefly address the primary arguments raised in defendants' memoranda. Defendants first contend that only the Federal Trade Commission may grant injunctive relief under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a-1681t ("FCRA"). Second, defendants maintain that the definition of the class certified by this Court is inappropriate because it is circular and prejudges liability. Third, defendants argue that it is impossible for plaintiffs to make out any violation of the FCRA, because the obtaining by insurance companies of written authorizations from consumers forecloses any inquiry into whether credit reporting agencies followed reasonable procedures in releasing the reports.

2. Private Actions for Injunctive Relief under the FCRA

There is no Fifth Circuit authority as to whether injunctive relief is available to private litigants under the FCRA. There are, however, district court cases from other Circuits which reach opposite results. *Mangio v. Equifax*, 887 F. Supp. 283, 284-85 (S.D. Fla. 1995) holds that such relief is available only to the Federal Trade Commission. *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092, 1096-97 (D.C. Ariz. 1974) *aff'd* 524 F.2d 1145 (9th Cir. 1975), on the other hand, found in a class action context that injunctive relief was available to private individuals under the FCRA.

The Court finds that case law, statutory language, and legislative history militate against the *Mangio* position.

Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction. *Califano v. Yamasaki*, 442 U.S. 682, 705, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). Congress has issued no such contrary command here. Though the FCRA provides the Federal Trade Commission with the power to enforce the Act, it does not state that that power is exclusive. 15 U.S.C. § 1681(s). Moreover, a recent amendment to the FCRA, 15 U.S.C. § 1681(s)(2) - (b)(2)(d), enacted after the *Mangio* decision, provides the FCRA with exclusive enforcement power over another section of the Act, but not over Section 1681e, which is at issue here. Finally, as plaintiffs note, there is legislative authority to the effect that Congress intended the remedies of consumers and the FTC to be complementary, and that consumers should have recourse in court against potential violations of the Act. H.R. 15073, 91st Cong., 2nd Sess., 116 Cong. Rec. 35937 (1970), at p. 35940-41. Thus injunctive relief is available to private individuals under the FCRA.

3. Declaratory Relief Under the FCRA

Even if private injunctive actions were unavailable under the FCRA, a class action could be maintained for declaratory relief. Rule 23(b)(2) permits a class action where:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

> injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2).

The Advisory Committee Notes to Rule 23 state that "declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Advisory Committee Notes, Fed. R. Civ. P. 23(b) (2). Here, as a practical matter a declaration that defendants are in violation of Section 1681e(a) of the FCRA would serve as a basis for a later injunctive action by the Federal Trade Commission.

4. Definition of the Class

The class definition in the Order and Reasons entered on March 12, 1998, reads as follows:

> all persons whose credit reports have been furnished to an insurance company during the period from April 2, 1995 to the present, by computer access, in violation of 15 U.S.C. 1681e(a), by defendants CSC Services, Inc., or Equifax Inc., or any of their subsidiaries, or by access to databases owned by any of them

Defendants contend that this definition, because of its utilization of the phrase "in violation of 15 U.S.C. 1681e(a)," is impermissible because it is circular and because it prejudges liability. A similar allegation was made in *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993). According to the

Fifth Circuit, the defendant there asserted that "this [class] definition is hopelessly circular, as the court must first determine whether an employee's pension benefits were properly reduced before that person may be said to be a member of the class." *Id.* at 1104. The Fifth Circuit dismissed this argument, stating "this argument is meritless, and if accepted, would preclude certification of just about any class of persons alleging injury from a particular action." *Id.* Thus the fact that the class definition here is defined in terms of a legal violation is no bar.

However, to more clearly demarcate the boundaries of the class, the Court will amend the definition to eliminate the phrase "in violation of 15 U.S.C. 1681e(a)," as that statutory section requires only that the credit reporting agencies observe "reasonable procedures" to ensure that credit reports are being used for a permissible purpose, and replace it with the specific recommendations of that section as enunciated by the Federal Trade Commission Commentary.

The FTC Commentary calls upon consumer reporting agencies furnishing reports to insurance companies to receive:

1) an initial blanket certification from the insurance company stating:

> i) a permissible purpose for which the credit report is sought,
>
> ii) that the credit report will be used for no other purpose, and

> iii) that the insurance company is expressly prohibited from sharing the credit report or providing it to anyone else, other than the subject of the report or a joint user having the same purpose.

2) a separate certification from the insurance company for each credit report requested stating that the report was only to be used for a permissible purpose, and

16 C.F.R. Ch. 1, Subchapter F-Statements of General Policy or Interpretation under the Fair Credit Reporting Act (January 1, 1995 edition) (hereinafter "FTC Commentary"), pp. 386, 396-97.

The defendants appear to argue that the FTC recommendations are unreasonably stringent, but that goes to the merits of the claim. It may well be, also, that the FTC Commentary recommendations are unreasonably lenient. Requiring only a perfunctory assurance from an insurance company before issuing a credit report may not be a reasonable procedure. As a reasonable procedure, the credit reporting agencies may be required to actually receive the consumer's written authorization, as is common for disclosures of medical records. These questions, of course, go to the merits of the class action claim. But for purposes of certifying the class, the FTC recommendations provide an objective standard for identifying the class and for setting the stage to determine what "reasonable" procedures are.

5. Independent Duties

Defendants maintain that it is impossible for plaintiffs to make out any violation of the FCRA, because the obtaining

by insurance companies of written authorizations from consumers forecloses any inquiry into whether credit reporting agencies followed reasonable procedures in releasing the reports.

The facts of this case render this contention inapt. There is no evidence in the record that indicates that defendants ever knew whether the insurance companies to whom they were releasing reports had received written authorizations from consumers. Moreover, there is no indication that the insurance companies even represented to the defendants that they had received such authorizations.

Furthermore, the duty of the insurance company only to use reports for permissible purposes is independent of the duty of the credit reporting agencies to employ reasonable procedures when issuing the reports. The fact that an insurance company may have protected itself and the consumers with written authorizations should not foreclose inquiry into whether the defendants independently maintained reasonable procedures in protecting consumer privacy.

6. 23(b)(3) Class Action

Alternatively, should it be determined that there is no private cause of action for injunctive relief under the FCRA or that certification under Fed. R. Civ. Proc. 23(b)(2) is otherwise inappropriate, the Court finds that class certification is appropriate under Fed. R. Civ. Proc. 23(b)(3).

Class certification is merited under Fed. R. Civ. Proc. 23(b)(3) if, in addition to the prerequisites of Fed. R. Civ. Proc. 23(a), the court finds that:

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other methods for a fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interests of the members of the class in individually controlling prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) concentrating the litigation of the claims in a particular forum; (D) the difficulties likely to be encountered in management of a class action.

Fed. R. Civ. Proc. 23 (b)(3).

Deciding whether common issues predominate and whether the class action is a superior method to resolve the controversy requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case. *Allison v. Citgo Petroleum Corp.*, 1998 U.S. App. LEXIS 9773, No. 9630489, 1998 WL 244989 at *13 (5th Cir. May 15, 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

Citing to cases against insurance companies, defendants maintain that eight separate and individualized inquiries would have to be made for each member of the putative class. However, as described above, the case at hand

involves a different set of defendants with a different and independent set of duties. Liability here does not revolve around whether a third party – the insurance companies – obtained written authorizations from consumers or whether there were fraudulent circumstances surrounding the procurement of those authorizations. Rather, it hinges solely on a single determination of fact and a single question of federal law identical to all plaintiffs.

Factually, the defendants' standard procedures with regard to issuing consumer credit reports to insurance companies must be discerned. Did the defendants require that the insurance companies submit actual written authorizations from consumers, or only statements indicating that such authorizations had been obtained? Did the defendants require an initial blanket certification from the requesting insurance companies? What was that certification required to state? Finally, did the defendants require a separate certification for each report, and what was that certification required to state? At this point in time, from its analysis of the record and the case as a whole, it appears to the Court that defendants' procedures were standard and applied uniformly to all members of the putative class. As such, the factual predicate of liability can be determined almost without reference to the circumstances surrounding each individual plaintiff.

As for common questions of law, liability here turns on a single federal question applicable to the class as a whole – whether defendants' procedures for protecting consumer privacy were "reasonable" under the FCRA. The situation here thus differs from that in *Allison*, where individualized factual inquiries were required to determine liability for each

plaintiff, and where the issues of liability and damages also overlapped.

In sum, the liability issue is identical for each plaintiff. Thus, for determinations of liability, both common questions of law and common questions of fact easily predominate over those affecting only individual members.

Turning to questions of damages, however, the Court finds that some matters may necessitate plaintiff-specific inquiries. Section 1681o of the FCRA entitles consumers to actual damages in the event of negligent noncompliance. 15 U.S.C. @ 1681o. Section 1681n of the FCRA entitles consumers to either actual damages or to statutory damages ranging from $ 100.00 to $ 1,000.00. 15 U.S.C. @ 1681n.

A finding of negligent noncompliance would entitle plaintiffs to actual damages, and thus perhaps necessitate the ordering of separate trials to determine damages. This possibility, however, even if it were to come to fruition, would not render class certification inappropriate for the issue of liability.[2]

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[2] Fed. R. Civ. P. 23(c)(4) states:

> When appropriate an action may be brought or maintained as a class action with respect to particular issues.

Fed. R. Civ. P. 23(c)(4).

Also instructive are the Advisory Committee Notes to Fed R. Civ. P. 23(c)(4), which state:

In the event of a finding of willful noncompliance, however, maintenance of a class action through the damages phase of the proceeding would be appropriate. Those few who felt that they possessed large claims could opt out and seek actual damages, and those who did not could remain in the case and seek statutory damages, which could be determined with minimal, if any, plaintiff-specific inquiry.

As to superiority, the second consideration in Rule 23(b)(3) actions, the Fifth Circuit in *Castano* in denying class certification stated as follows:

> "Finally, the most compelling rationale for finding superiority in a class action – the existence of a negative value suit – is missing in this case."

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Advisory Committee Notes to Fed R. Civ. P. 23(c)(4). Thus liability issues can be appropriate for class treatment even if damages are not, particularly in a case such as the one at hand, where the liability issue is identical for each plaintiff and is independent of damages.

Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996). The situation here presents precisely that compelling rationale, and thus poses exactly the type of collective-action problem for which the class action device was devised. Unlike in *Castano* or *Allison*, the plaintiffs here, if successful, will be entitled only to relatively small awards. Only through grouping themselves together can their claims be pursued.

Additionally, even if the damages issues were to be tried separately, which they may not, class treatment of the liability issue will promote efficiency and economy in the overall resolution of the case. Separate trials on an identical liability issue would be wasteful. Also, the Seventh Amendment constraint on separate damage trials raised in *Allison*, 1998 WL 244989 at *14-18, does not apply as the issues raised in a given damage trial would not overlap either with liability or with the damages trials of other plaintiffs.

Lastly, the Court finds that the four considerations enumerated in the latter part of Rule 23(b)(3) also weigh in favor of certification. First, as stated above, the members of the class have little interest or incentive to maintain individual actions due to the paucity of the damages to which most of them would presumably be entitled. As for the second factor, to the knowledge of the Court, there is no other pending litigation brought by the plaintiffs on the matter. Third, concentrating the determination of whether defendants' standard procedures violate the FCRA in one court would avoid the risk of inconsistent determinations. Fourth, the only significant difficulties in case management would arise in the damages phase. Those difficulties either may not arise at all or will be dealt with via separate damage trials. In

either case they would not affect certification for liability issues. The Court thus grants class certification for all issues in the case, with the possibility of severance at a later date for separate trials on damages.

Accordingly,

IT IS ORDERED that the Motion for Reconsideration by defendant CSC Credit Services, Inc. (Record Document No. 49), and the Motion for Reconsideration, by defendant Equifax, Inc. (Record Document No. 48), requesting that the Court reconsider its Order and Reasons entered on March 12, 1998 and that the Court deny plaintiffs' Motion to Certify Class, are DENIED.

IT IS FURTHER ORDERED that the class definition in the Order and Reasons entered on March 12, 1998, be amended to read as follows:

> all persons whose credit reports have been furnished to an insurance company during the period from April 2, 1995 to the present, by computer access, by defendants CSC Services, Inc., or Equifax, Inc., or any of their subsidiaries, or by access to databases owned by any of them, where the consumer reporting agency assembling and/or furnishing the report(s) did not receive:
>
> 1) an initial blanket certification from the insurance company stating

i) a permissible purpose for which the credit report is sought,

ii) that the credit report will be used for no other purpose, and

iii) that the insurance company is expressly prohibited from sharing the credit report or providing it to anyone else, other than the subject of the report or a joint user having the same purpose, and

2) a separate certification from the insurance company for each credit report requested stating that the report was only to be used for a permissible purpose.

IT IS FURTHER ORDERED that the above class be certified under Fed. R. Civ. P. 23(b)(2), or in the alternative under Fed. R. Civ. P. 23(b)(3).

IT IS FURTHER ORDERED that all issues fairly presented by the Court's Order and Reasons entered on March 12, 1998, and the Order and Reasons issued today, are hereby certified to the United States Court of Appeal for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

New Orleans, Louisiana, this 8th day of July, 1998.

GINGER BERRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX D

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USC § 1681b (2000)

§ 1681b. Permissible purposes of consumer reports

(a) In general. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer

in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 454 of the Social Security Act *(42 U.S.C. 654)* for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes.

(1) Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of

any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title [*15 USC §§ 1681* et seq.], as prescribed by the Federal Trade Commission under section 609(c)(3) [*15 USC § 1681g*(c)(3)].

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a

consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3) [*15 USC § 1681m*(a)(3)]; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment

application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3) [*15 USC § 1681g*(c)(3)].

(B) Application by mail, telephone, computer, or other similar means.

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 615(a) [*15 USC* §

1681m(a)], within 3 business days of taking such action, an oral, written or electronic notification--

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 609(c)(3) [*15 USC § 1681g*(c)(3)].

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail,

telephone, computer, or other similar means.

(4) Exception for national security investigations.

(A) In general. In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that--

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will--

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation. Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made--

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department. For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior

Executive Service or equivalent civilian or military rank.

(D) Report to the Congress. Not later than January 31 of each year, the head of each agency and department of the United States Government that exercised authority under this paragraph during the preceding year shall submit a report to the Congress on the number of times the department or agency exercised such authority during the year.

(E) Definitions. For purposes of this paragraph, the following definitions shall apply:

(i) Classified information. The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 [*50 USC § 401* note] or successor orders.

(ii) National security investigation. The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.

(1) In general. A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if --

(A) the consumer authorizes the agency to provide such report to such person; or

(B) (i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e); and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(b). A person may receive pursuant to paragraph (1)(B) only--

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. Except as provided in section 609(a)(5) [*15 USC § 1681g*(a)(5)], a consumer reporting agency shall not furnish to any

person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) [Reserved]

(e) Election of consumer to be excluded from lists.

(1) In general. A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1)--

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall--

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form

issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. An election of a consumer under paragraph (1)--

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency--

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system.

(A) In general. Each consumer reporting agency that, under subsection (c)(1)(B), furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer shall--

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996], and not less than annually thereafter, in a publication of general circulation in the area served by the agency--

(I) a notification that information in consumer files

maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance. Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide. Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited. A person shall not use or obtain a consumer report for any purpose unless--

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 607 [*15 USC § 1681e]* by a prospective user of the report through a general or specific certification.

(g) Furnishing reports containing medical information. A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

APPENDIX E

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USC § 1681e (2000)

§ 1681e. Compliance procedures

(a) Identity and purposes of credit users. Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 [*15 USCS § 1681c*] and to limit the furnishing of consumer reports to the purposes listed under section 604 [*15 USCS § 1681b*]. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604 [*15 USCS § 1681b*].

(b) Accuracy of report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed. A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information.

(1) Notice requirement. A consumer reporting agency shall provide to any person--

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this title [*15 USCS §§ 1681* et seq.].

(2) Content of notice. The Federal Trade Commission shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph.

(e) Procurement of consumer report for resale.

(1) Disclosure. A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report--

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 604 [*15 USCS § 1681b]* for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale. A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall--

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 604 [*15 USCS § 1681b],* including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person--

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a Federal agency or department. Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the

report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if--

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 604(b)(4)(E)(i) [*15 USCS § 1681b* (b)(4)(E)(i)]); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

APPENDIX F

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USCS § 1681h (2000)

§ 1681h. Conditions and form of disclosure to consumers

(a) In general.

(1) Proper identification. A consumer reporting agency shall require, as a condition of making the disclosures required under section 609 [*15 USCS § 1681g],* that the consumer furnish proper identification.

(2) Disclosure in writing. Except as provided in subsection (b), the disclosures required to be made under section 609 [*15 USCS § 1691g]* shall be provided under that section in writing.

(b) Other forms of disclosure.

(1) In general. If authorized by a consumer, a consumer reporting agency may make the disclosures required under 609 [*15 USCS § 1691g]*--

(A) other than in writing; and

(B) in such form as may be--

(i) specified by the consumer in accordance with paragraph (2); and

(ii) available from the agency.

(2) Form. A consumer may specify pursuant to paragraph (1) that disclosures under section 609 [*15 USCS § 1691g]* shall be made--

(A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;

(B) by telephone, if the consumer has made a written request for disclosure by telephone;

(C) by electronic means, if available from the agency; or

(D) by any other reasonable means that is available from the agency.

(c) Trained personnel. Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 609 [*15 USCS § 1681g].*

(d) Persons accompanying consumer. The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability. Except as provided in sections 616 and 617 [*15 USCS §§ 1681n* and 1681o], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting

agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [*15 USCS § 1681g,* 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

APPENDIX G

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USCS § 1681n (2000)

§ 1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title [*15 USC §§ 1681* et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

APPENDIX H

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USC § 1681o (2000)

§ 1681o. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title [*15 USC §§ 1681* et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

APPENDIX I

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

15 USC § 1681u (2000)

§ 1681u. Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions. Notwithstanding section 604 [*15 USC § 1681b]* or any other provision of this title [*15 USC §§ 1681* et seq.], a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 1101 of the Right to Financial Privacy Act of 1978 [*12 USC § 3401])* at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that--

(1) such information is necessary for the conduct of an authorized foreign counterintelligence investigation; and

(2) there are specific and articulable facts giving reason to believe that the consumer--

(A) is a foreign power (as defined in section 101 of the Foreign Intelligence Surveillance

> Act of 1978 [*50 USC § 1801]*) or a person who is not a United States person (as defined in such section 101) and is an official of a foreign power; or
> (B) is an agent of a foreign power and is engaging or has engaged in an act of international terrorism (as that term is defined in section 101(c) of the Foreign Intelligence Surveillance Act of 1978 [*50 USC § 1801*(c)]) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States.

(b) Identifying information. Notwithstanding the provisions of section 604 [*15 USC § 1681b]* or any other provision of this title [*15 USC §§ 1681* et seq.], a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that--

> (1) such information is necessary to the conduct of an authorized counterintelligence investigation; and
> (2) there is information giving reason to believe that the consumer has been, or is about to be, in contact with a foreign power or an agent of a foreign power (as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [*50 USC § 1801]*).

(c) Court order for disclosure of consumer reports. Notwithstanding section 604 [*15 USC § 1681b]* or any other provision of this title [*15 USC §§ 1681* et seq.], if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that--

(1) the consumer report is necessary for the conduct of an authorized foreign counterintelligence investigation; and

(2) there are specific and articulable facts giving reason to believe that the consumer whose consumer report is sought--

(A) is an agent of a foreign power, and

(B) is engaging or has engaged in an act of international terrorism (as that term is defined in section 101(c) of the Foreign Intelligence Surveillance Act of 1978 [*50 USC § 1801*(c)]) or clandestine intelligence activities that involve or may involve a violation of criminal statutes of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Confidentiality. No consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person, other than those officers, employees, or agents of a consumer reporting agency necessary to fulfill the requirement to disclose information to the Federal Bureau of Investigation under this section, that the Federal Bureau of Investigation has sought or obtained the identity of financial

institutions or a consumer report respecting any consumer under subsection (a), (b), or (c), and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information or a consumer report.

(e) Payment of fees. The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination. The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(g) Rules of construction. Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this Act. Nothing in

this section shall be construed to authorize or permit the withholding of information from the Congress.

(h) Reports to Congress. On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c).

(i) Damages. Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of--

(1) $100, without regard to the volume of consumer reports, records, or information involved;
(2) any actual damages sustained by the consumer as a result of the disclosure;
(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and
(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations. If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of

whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception. Notwithstanding any other provision of this title [*15 USC §§ 1681* et seq.], any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this title, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(l) Limitation of remedies. Notwithstanding any other provision of this title, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief. In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

APPENDIX J

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 151. DECLARATORY JUDGMENTS

28 USC § 2201 (2000)

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USC 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USC 1516a(f)(10)]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USC 355 or 360b].

APPENDIX K

FEDERAL RULES OF CIVIL PROCEDURE
IV. PARTIES

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests

of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall

determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(A) the court will exclude the member from the class if the member so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses

and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court,

and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(2)

Supreme Court, U.S.
FILED
MAY 25 2000

No. 99-1623

IN THE

Supreme Court of the United States

BERNITA WASHINGTON, *et al.*,

Petitioners,

v.

CSC CREDIT SERVICES, INC., EQUIFAX CREDIT INFORMATION SERVICES, INC. and EQUIFAX, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

CSC Credit Services, Inc. is a wholly-owned (directly or indirectly) subsidiary of Computer Sciences Corporation, which is a publicly held company.

Equifax Inc. is a publicly held company. There is no parent or publicly held company owning 10% or more of the stock of Equifax Inc.

Equifax Credit Information Services, Inc. is a wholly-owned subsidiary of Equifax Inc.

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SUMMARY OF THE CASE

Petitioners seek to represent a nationwide class alleging that Respondents, CSC Credit Information Services, Inc. ("CSC"), Equifax Inc., and Equifax Credit Information Services, Inc. ("ECIS"),[1] violate the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u ("FCRA") when providing credit reports to their insurance company subscribers. In bringing this action, however, Petitioners attempt to sidestep 30 years of case law interpreting the FCRA, the Constitutional requirement of standing and Congressional intent. The Fifth Circuit recognized these legitimate obstacles to class certification and, in a carefully reasoned opinion, vacated and reversed the class certification by the district court.

ECIS and CSC are credit reporting agencies as defined by the FCRA. 15 U.S.C. § 1681a (1994 & Supp. IV 1998). As such, they assemble and provide consumer credit information to third parties that they believe have a permissible purpose to obtain the information. *See* 15 U.S.C. §§ 1681a(f), 1681b (1994 & Supp. IV 1998). The FCRA requires ECIS and CSC to implement "reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under § 1681b." 15 U.S.C. § 1681e(a) (1994 & Supp. IV 1998). To that end, ECIS and CSC require each of their subscribers, at the time the Subscriber Agreement

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1. Equifax Inc. was the original defendant in the district court and was the co-appellant with CSC in the appeal to the Fifth Circuit. During the time this matter was pending before the Fifth Circuit, the district court granted Petitioners' motion to add ECIS as a co-defendant. ECIS is a wholly-owned subsidiary of Equifax Inc. and is a credit reporting agency as defined by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u. Equifax Inc. is simply a holding company and is not a credit reporting agency.

is signed, to provide (among other things) an initial certification (sometimes referred to as a "blanket certification"), as provided by FCRA § 1681e(a), in which the subscribers must "identify themselves, certify the purpose for which the information is sought, and certify that the information will be used for no other purpose." Nothing more is required under FCRA § 1681e(a).

Relying upon their interpretation of certain FTC commentary, Petitioners claim that ECIS and CSC's reliance upon an initial or "blanket" certification is unreasonable when the subscriber requesting a credit report is an insurance company. Federal Trade Commission Advice and Commentary on the Fair Credit Reporting Act [16 C.F.R. Part 600]. They argue instead that ECIS and CSC must obtain an individual certification of permissible purpose each and every time an insurance company seeks a report.

At its core, this case raises the above-described issue of reasonable procedures. The only issues that can be raised by Petitioners in their Petition, however, are the preliminary issues of standing, the elements of a claim under the FCRA, and the relief afforded to a private litigant under the FCRA.

The district court in its original decision and its decision on Respondents' motion for reconsideration certified a nationwide class action. *Washington v. CSC Credit Services, Inc.*, 178 F.R.D. 95 (E.D. La.), *modified on reconsideration*, 180 F.R.D. 309 (E.D. La. 1998). In its first opinion, the court certified a class under Fed. R. Civ. P. 23(b)(2) consisting of all persons whose credit reports were provided to an insurance company by ECIS or CSC in violation of 15 U.S.C. § 1681e(a). 178 F.R.D. at 103. The court ruled, erroneously, that whether or not the Petitioners' (and the class members') credit reports actually had been obtained by an insurance company without a permissible purpose was irrelevant for the purposes of

establishing liability. 178 F.R.D. at 100; 180 F.R.D. at 313. The district court concluded that any consumer whose credit report was obtained by an insurance company could state a cause of action under the FCRA against a credit reporting agency and claim that its procedures did not comply with the FCRA, whether the insurance company had a permissible purpose to obtain the credit report or not.

On the issue of standing, the district court stretched beyond the boundaries of Article III and found an injury in fact. 178 F.R.D. at 102. It found "the mere issuance of the reports themselves under improper procedures constitutes an invasion of privacy." *Id.* The court further found that because Petitioners alleged, in prior actions against the insurance companies, that the insurance companies used the credit reports to embarrass and humiliate them and to induce them to accept inadequate compensation for their claims, an injury had occurred. *Id.*

The second error made by the district court was its conclusion that injunctive relief is available to a private litigant under the FCRA. 180 F.R.D. at 312. In so finding, the district court ignored Congressional intent and the well-reasoned opinions of several district courts. Further, in its decision on reconsideration, the district court failed to apply the standard set forth in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), for determining when injunctive relief predominates over a request for monetary relief. In the decision on reconsideration, the court reaffirmed its decision to certify a class under Fed. R. Civ. P. 23(b)(2) and, in the alternative, certified a class under Fed. R. Civ. P. 23(b)(3).

On an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Fifth Circuit reversed and vacated the district

court's decisions. *Washington v. CSC Credit Services, Inc.*, 199 F.3d 263 (5th Cir. 2000). Following the two district courts that previously reached the issue, the Fifth Circuit held "a plaintiff bringing a claim that a reporting agency violated the 'reasonable procedures' requirement of § 1681e must first show that the reporting agency released the report in violation of § 1681b." 199 F.3d at 267. Next, the Fifth Circuit, applying the standard set forth in this Court's decision in *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), found that injunctive relief is not available to private litigants. 199 F.3d at 268. The court based its holding upon the language of the FCRA and the expression by Congress of its intent. Thus, after correcting the errors made by the district court, the Fifth Circuit reversed the class certification under Rule 23(b)(2), and vacated the class certification under Rule 23(b)(3).

Petitioners have articulated no compelling issue that merits review by this Court. The two previously reported decisions on the interpretation of the FCRA and the threshold showing necessary to challenge a reporting agency's procedures rejected Petitioners' analysis.[2] On the issue of injunctive and declaratory relief, Petitioners have offered no support for their contention that the Fifth Circuit erred. The Fifth Circuit adhered to this Court's precedents and Congressional intent. Lastly, Petitioners' attempt to fabricate a compelling need for the Court to address this issue is belied by the lack of litigation on the issue and the Federal Trade Commission's jurisdiction over credit reporting agencies under the FCRA.

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2. The previous decisions are *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998), and *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Ga. 1976).

1. The Fifth Circuit followed precedent and Congressional intent by holding that a consumer must demonstrate an injury (*i.e.*, the disclosure of his report for an impermissible purpose) before challenging a credit reporting agency's procedures.

The FCRA requires credit reporting agencies to "maintain reasonable procedures designed . . . to limit the furnishing of consumer reports to the purposes listed under section 1681b." 15 U.S.C. § 1681e(a) (1994 & Supp. IV 1998). The Fifth Circuit correctly reasoned that "this purpose is not furthered unless a plaintiff suffers the harm the procedures are meant to prevent." 199 F.3d at 266.

In reviewing the "harm" Congress intended to prevent, the Fifth Circuit reviewed Congress' statements on the purpose for enacting the FCRA:

> Similarly, Congress has stated that it adopted the "reasonable procedures" requirement to "meet[] the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). Congress identified actual injuries — including breaches of "confidentiality" and "[im]proper utilization" — which only occur if there is an improper disclosure, suggesting that a general claim of improper procedures is by itself inadequate. *Id.*
>
> In light of the purposes of the FCRA, we find that the actionable harm the FCRA envisions is improper disclosure, not the mere risk of improper

> disclosure that arises when "reasonable procedures" are not followed and disclosures are made.

199 F.3d at 266-67 (alterations in original).

The Fifth Circuit's interpretation is consistent with the decisions of the only other courts to reach the issue. *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1067 (C.D. Cal. 1998) ("it makes no sense for a consumer whose file was disclosed only for permissible purposes to nevertheless be able to challenge the reasonableness of the consumer reporting agency's procedures."); *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013, 1016 (N.D. Ga. 1976) ("once it is shown that the information was relevant and for a permissible purpose, this court need not inquire into the reasonableness of the underlying procedures adopted by the agency to assure that the information will be furnished for [permissible] purposes").

Other courts' interpretation of a related subsection of the FCRA, § 1681e(b), further supports the Fifth Circuit's decision. Section 1681e(b) requires credit reporting agencies to maintain reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom the report relates. Courts applying § 1681e(b) uniformly limit recovery to cases where the failure to adopt procedures causes actual harm (*i.e.*, the release of an inaccurate report) to the consumer.[3]

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3. *See, e.g.*, *Spence v. TRW, Inc.*, 92 F.3d 380, 382 (6th Cir. 1996); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995); *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994); *Cahlin v. General Motors Acceptance Corp.*, (Cont'd)

Finding that Congress' intent was to limit actions to those who had suffered actual harm, the Fifth Circuit did not reach the issue of Constitutional standing. Petitioners' attempt to expand the FCRA beyond this clear limit, however, would result in expanding standing beyond the limits imposed by Article III. Petitioners' argument that a consumer need not show an impermissible disclosure to bring suit suffers from the infirmity that such a consumer has not suffered an injury in fact. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998) ("there must be alleged (and ultimately proven) an injury in fact — a harm suffered by the plaintiff that is concrete and actual or imminent not conjectural or hypothetical") (internal

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936 F.2d 1151, 1156 (11th Cir. 1991); *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 39 (D.C. Cir. 1984); *Todd v. Associated Credit Bureau Servs., Inc.*, 451 F. Supp. 447, 449 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (3d Cir. 1978); *Peller v. Retail Credit Co.*, Civ. A. No. 17900 (N.D. Ga. Dec. 6, 1973), *aff'd memo*, 505 F.2d 733 (5th Cir. 1974); *LeCompte v. Credit Bureau of Baton Rouge, Inc.*, Civ. A. No. 95-2019, 1996 WL 255923, *2 (E.D. La. May 13, 1996); *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 829 (E.D.N.Y. 1994); *Grant v. TRW, Inc.*, 789 F. Supp. 690, 692 (D. Md. 1992); *Boothe v. TRW Credit Data*, 768 F. Supp. 434, 437 (S.D.N.Y. 1991); *Grays v. Trans Union Credit Info. Co.*, 759 F. Supp. 390, 393 (N.D. Ohio 1990); *Houston v. TRW Info. Servs.*, 707 F. Supp. 689, 691 (S.D.N.Y. 1989); *Altmanshofer v. TRW, Inc.*, 95 B.R. 729, 730 (C.D. Ca. 1988); *Watson v. Credit Bureau, Inc.*, 660 F. Supp. 48, 50 (S.D. Miss. 1986); *Lowry v. Credit Bureau, Inc.*, 444 F. Supp. 541, 544 (N.D. Ga. 1978); *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 497 (D. Conn. 1978); *Roseman v. Retail Credit Co.*, 428 F. Supp. 643, 646 (E.D. Pa. 1977); *Pendleton v. Trans Union Sys. Corp.*, 76 F.R.D. 192, 195 (E.D. Pa. 1977); *Austin v. BankAmerica Serv. Corp.*, 419 F. Supp. 730, 733 (N.D. Ga. 1974).

quotations omitted).[4] Article III, of course, requires such an injury. Petitioners' erroneous interpretation leaves out this fundamental tenet of standing.

The Fifth Circuit's interpretation properly balances the purposes of the FCRA with the necessities of modern commerce. Its interpretation does not in any way prevent an injured plaintiff from suing a credit reporting agency. Moreover, despite Petitioners' rhetoric, a court cannot sacrifice the proper interpretation of a statute to relax the rigorous demands of Rule 23. Whether or not a class action can be certified under the Fifth Circuit's interpretation of the FCRA is irrelevant — the only question that is relevant is whether the Fifth Circuit's interpretation is correct. And based upon this Court's precedents, Congressional intent, and prior consistent court opinions, the Fifth Circuit's holding is correct.

2. The Fifth Circuit applied the correct legal standard in holding that injunctive relief is not available to private litigants under the FCRA.

In addressing the issue of injunctive relief, the Fifth Circuit recognized and applied the standard established in this Court's seminal decision of *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) — "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." 199 F.3d at 268. The Fifth Circuit then considered "whether Congress 'clearly and unambiguously limited the court's equity jurisdiction' under the FCRA." 199 F.3d at 268.

4. Petitioners' reliance on a threat of imminent harm is completely unsupported by the Record and not alleged by the Petitioners in their Complaint. Further, neither the District Court nor the Fifth Circuit made any finding of imminent harm.

The Fifth Circuit began by examining the language and framework of the FCRA. Section 1681p of the FCRA gives courts jurisdiction over "[a]n action to enforce any liability created under this subchapter." The term liability is discussed in the FCRA's civil liability provisions (§§ 1681n-1681o), both of which expressly refer to damages and attorneys fees without mentioning injunctive relief. The court considered this omission significant "because the Act elsewhere expressly grants the power to obtain injunctive relief to the FTC." 199 F.3d at 268 (*citing* FCRA, 15 U.S.C.A. § 1681s(a) (West 1998 & Supp. IV 1999)).

While finding the affirmative grant of power to the FTC to pursue injunctive relief coupled with the absence of a similar grant to private litigants dispositive of the issue, the Fifth Circuit cited further evidence to support its holding. As part of the 1996 amendments to the FCRA, Congress enacted § 1681u, which requires reporting agencies to disclose consumer information to the FBI "for counterintelligence purposes." This section provides consumers not only with a damages remedy, it specifies, "[i]n addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section." 15 U.S.C. § 1681u(m) (1994 & Supp. IV 1998). Thus, the Fifth Circuit continued, "where Congress intended to allow private injunctive relief under the FCRA, it expressly stated that the relief was available[; t]his language would be unnecessary if injunctive relief were otherwise available." 199 F.3d at 269.

To read the statute as requested by Petitioners would fail to give effect to the specific grant of the right to injunctive relief in § 1681u. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[w]here Congress includes particular language

in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("words in statutes should not be discarded as 'meaningless' and 'surplusage' when Congress specifically and expressly included them, particularly where the words are excluded in other sections of the same act"). The only way to give meaning to all of the words of § 1681u is to find, as did the Fifth Circuit, that injunctive relief is not available to private litigants bringing actions under §§ 1681n and 1681o. Petitioners offer no explanation for the difference in language between § 1681n and § 1681o as compared to § 1681u, nor can they.

The Fifth Circuit did note the split in authority at the *district court* level on this issue.[5] The circuit court conflict alluded to by Petitioners, however, is illusory. In *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092 (D. Ariz. 1974), *aff'd on other grounds*, 524 F.2d 1145 (9th Cir. 1975), the district court granted plaintiff's request for an injunction. There is no discussion by the district court of the availability

5. *Compare Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (holding that it lacked the power to grant a private litigant's request for injunctive relief under the FCRA); *Ditty v. Checkrite, Ltd.* 973 F. Supp. 1320, 1338 (D. Utah 1997) (same); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284-85 (S.D. Fla. 1995) (same); *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 668 (W.D. Pa. 1974) (same) with *Andrews*, 7 F. Supp. 2d at 1084 & n.33 (concluding that the FCRA "does allow injunctive relief on the plaintiff's own behalf"); *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092, 1096-97 (D. Ariz. 1974) (certifying a class action on a claim for injunctive relief under the FCRA and granting preliminary injunctive relief), *aff'd on other grounds*, 524 F.2d 1145 (9th Cir. 1975).

of an injunction under the FCRA, nor does it appear that the issue was contested by the defendants. The Ninth Circuit, likewise, did not discuss the issue because the only issue raised by the appellant was whether it was a credit reporting agency. 524 F.2d 1145, 1146 (9th Cir. 1975). Thus, the "conflict" relied on by Petitioners does not exist. The Fifth Circuit is the first circuit to review this issue.

3. The Fifth Circuit correctly concluded that Petitioners could not maintain a Rule 23(b)(2) class seeking declaratory relief.

In reversing the Rule 23(b)(2) class with respect to Petitioners' request for declaratory relief, the Fifth Circuit identified two fatal flaws in Petitioners' analysis.

First, Rule 23(b)(2) specifically provides that a class action can be certified where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, *thereby making appropriate final injunctive relief or corresponding declaratory relief* with respect to the class as a whole." (Emphasis added.) The Advisory Committee Notes state that "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Advisory Committee Notes to 1966 Amendment to Fed. R. Civ. P. 23.

The Fifth Circuit correctly concluded that certifying a class pursuant to Rule 23(b)(2) "would frustrate the FCRA's limitation of injunctive relief to the FTC." 199 F.3d at 269. "Unable to obtain injunctive relief directly, consumers could attempt to obtain it indirectly by obtaining declaratory relief solely for the purpose of later prompting the FTC to move for injunctive relief." *Id.*

Petitioners' reliance on the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, is misplaced.[6] The Declaratory Judgment Act "was enacted to afford an added remedy to one who is uncertain [of] his rights and who deserves an early adjudication without having to wait until he is sued by his adversary." *Leven Metals Corp. v. Parr-Richard Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (citations omitted). The remedy available under the Act "is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued." 10 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2751, at 456-57 (3d ed. 1998) (footnotes omitted).[7]

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6. As a preliminary matter, Petitioners raise the Declaratory Judgment Act for the first time in their Petition. This issue was not briefed before the District Court or the Fifth Circuit. It did not serve as the basis of either court's decision. Thus, this issue cannot be raised for the first time on appeal.

7. *United Food and Commercial Workers Local Union 137 v. Food Employers Council, Inc.*, 827 F.2d 519 (9th Cir. 1987), is inapplicable. In *United Food*, the plaintiff union sought an injunction and declaratory judgment under the Clayton Act declaring a "most-favored nations" clause in a collective-bargaining agreement void. The court determined that the plaintiff union lacked standing to seek an injunction under the Clayton Act. *Id.* at 522. Moving to the issue of declaratory relief, the court found that the plaintiff union was in a position of uncertainty with respect to the clause and risked suits from other employers given its inability to determine its rights under the agreement at issue. *Id.* at 523-24. The court further held that allowing the plaintiff union to seek such a declaration did not conflict with the reasons for limiting injunctive relief under the Clayton Act.

(Cont'd)

Here, neither Petitioners nor the putative class members are in danger of being sued or require an early adjudication of their rights. Further, their request for declaratory relief conflicts with the FCRA's limitation on injunctive relief. Thus, declaratory relief in this case would serve none of the purposes of the Declaratory Judgment Act. Petitioners' request was properly denied.

The second flaw identified by the Fifth Circuit with respect to declaratory relief is the district court's conclusion that such relief was the predominant form of relief requested. Petitioners' attempt to identify error in the Fifth Circuit's analysis fails.

The Fifth Circuit in reviewing this issue relied upon its decision in *Allison*, 151 F.3d 402. This decision, as Petitioners concede, follows the majority of circuit courts, which have adopted the Advisory Committee's position and allowed monetary relief to be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought by the class is injunctive or declaratory. *See* Petition, p. 20, and cases cited therein. Petitioner did not identify any contrary law. There is no issue of unsettled law.

Petitioners' real argument is that the Fifth Circuit's application of its own precedent was erroneous. Petitioners are incorrect.

(Cont'd)

Id. at 524-25. In essence, the court held that a party to a contract should be able to seek a declaration with respect to its rights under the contract. *Id.* at 525. Here, we have no contract between the parties to be interpreted. Further, as found by the Fifth Circuit, the limitation placed on injunctive relief by the FCRA would conflict with and be frustrated by a private suit for declaratory relief. 199 F.2d at 269.

In *Allison*, the Fifth Circuit held "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." 151 F.3d at 415. This means that monetary damages must "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief" and must not depend "on the intangible subjective differences of each class member's circumstances" or "require additional hearings to resolve the disparate merits of each individual's case." *Id.*

Here, separate trials would be required to determine the individual class member's damages because the circumstances surrounding each class member's situation would have to be reviewed to establish actual damages. "The money damages in this case do not flow from declaratory relief but require separate adjudication." 199 F.3d at 269.[8] Therefore, under *Allison*, declaratory relief is not the predominant relief sought. The Fifth Circuit's analysis of this issue is correct.

Petitioners' continued reliance on the district court's opinions is misplaced. The district court in deciding this issue failed to apply the standard enunciated in *Allison*. Moreover, the district court specifically found that should a finding be made that ECIS and CSC had negligently failed to comply with the FCRA, separate trials would be required to determine actual damages. 180 F.R.D. at 314. If the alleged noncompliance were found to be willful, some class members would pursue actual damages, while others would pursue

8. Further, the Fifth Circuit found that "[i]t is counterintuitive to say that in their [Petitioners'] case, declaratory relief, which might hypothetically be used as the basis for future action by the FTC, 'predominates' over monetary relief, which will directly and immediately benefit them." 199 F.3d at 269.

statutory damages. This would also require separate trials, as a review of each class member's circumstances would be required for a determination of statutory, actual and punitive damages.[9]

4. There are no other reasons for review.

Petitioners' continued insistence upon the importance of these issues is belied by the paucity of litigation regarding the procedures at issue. No overwhelming number of cases on the issue have been commenced. Three cases have been filed against credit reporting agencies on this issue, all in the Eastern District of Louisiana — interestingly all were filed by the Petitioner's co-counsel.[10]

Congress has been vigilant in its efforts to regulate the credit reporting agencies. The FCRA, enacted in 1970, has been amended on several occasions to keep pace with the changes and advancements in technology. In 1996, the FCRA was significantly amended to further protect the interests of consumers.

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9. Unlike the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o which specifically provides for class damages (§ 1692k(a)(2)(B)), the FCRA does not specify "class" damages.

10. *LeBlanc v. Trans Union Corp.*, No. 98-2081 (E.D. La.); *Norris v. Experian Info. Solutions, Inc.*, No. 99-2580 (E.D. La.); *White v. Imperial Adjustment Corp., Imperial Fire and Cas. Co., Equifax Credit Info. Serv., Inc. and Equifax Inc.*, No. 99-3804 (E.D. La.). Any attempt by Petitioners to characterize this as a "negative value suit" is not well-founded. Even if the claim is small, the FCRA provides for recovery of reasonable attorneys' fees in the case of a successful action, which eliminates a financial barrier that make individual lawisuts unlikely or unfeasible. *See Allison*, 151 F.3d at 420; *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (*citing Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (5th Cir. 1975) (acknowledging that the availability of attorneys' fees is a common basis for finding non-superiority of a class action)).

Moreover, Congress gave the FTC enforcement authority to ensure compliance with the FCRA. The FTC has been an aggressive enforcer of the FCRA, bringing various proceedings against credit reporting agencies. *See, e.g., In the Matter of Trans Union Corp.*, Docket No. 9255, (FTC Feb. 10, 2000); *In the Matter of Equifax Credit Info. Serv., Inc.*, Docket No. C-3611, (FTC Aug. 14, 1995).

Petitioners would have this Court believe that the Fifth Circuit's decision leaves consumers with no remedy. That simply is not true. All consumers maintain their rights to seek redress for actual injuries. Moreover, the FTC has fulfilled and continues to fulfill its mission to enforce the FCRA. The Fifth Circuit's decision leaves both mechanisms in place.

CONCLUSION

For the foregoing reasons, review by this Court is unnecessary, and the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be denied.

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